No. 87-1207

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In The

Supreme Court of the United States

October Term, 1987

RAY WILL,

Petitioner,

v.

MICHIGAN DEPARTMENT OF STATE POLICE and DIRECTOR OF STATE POLICE,

Respondents.

ON WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

REPLY BRIEF OF PETITIONER

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ARGUMENT

I. RESPONDENTS MISREAD THE "CONTEXT OF THE EVENTS AND PASSIONS OF THE TIME" IN WHICH SECTION 1 WAS ENACTED.

The foundation of the briefs submitted by Respondents and their amici is the assertion that state sovereignty was more important than civil rights to the Congress that enacted Section 1 of the Civil Rights Act of 1871 ("the Act"), an assertion totally inconsistent with the "context of the events and passions of the time" they invoke. Respondents' Brief ("RBr") 27. For the Republicans who wrote the Act, the basic fundamental civil rights of individual human beings were more important than state sovereignty. Reply Appendix (RA) 22a, 23a, 30a, 38a, 51a, 58a, 68a, 84a, 100a, 102a, 133a, 143a.[1] For them, this credal principle needed no more proof than the history of the preceding decade.

The Civil War itself was fought to subjugate state sovereignty to human rights. However, the battle for human rights had not ended at Appomattox. The unregenerate southern states responded to Emancipation with the notorious Black Codes. The Republican-dominated Congress countered by enacting the Civil Rights Act of 1866, conferring on the courts the two most potent judicial powers in order to protect human rights: the power to invalidate state laws which violated human rights (Section 1) and the power to punish any person, including the highest state officials, who sought to enforce such

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[1] The Reply Appendix contains an enlarged photographic reproduction of every passage in the Congressional Globe cited in Petitioner's Brief on the Merits, Reply Brief and in the briefs of Respondents and their amici, arranged in chronological order with marginal citations to the original Globe pages. A cross-index by name of speaker appears in the Table of Contents. (On pages 47-48 of their brief, Respondents refer to seven speeches made in support of the Bill without specifically citing or relying on any passage from these speeches; accordingly, the Globe pages cited therein are not reproduced in the Appendix.)

invalid laws (Section 2). The Federal Freedmen's Bureau vigorously began enforcement of the 1866 Act with a direct assault on the heart of states' sovereignty by preventing their officers from enforcing state laws and performing their official functions. State court judges in particular were arrested and prosecuted for such official acts as refusing to admit the testimony of blacks or imposing unequal punishment on blacks as mandated by state law. RA 121a, see also R. Kaczorowski, *The Politics of Judicial Interpretation: The Federal Courts, Department of Justice and Civil Rights, 1866-1876* 37-38 (1985). These prosecutions were clearly understood as a direct attack on the state itself; indeed state legislatures appropriated funds to pay for the defense of their judges. Kaczorowski at 29. Arguments about the power of Congress to interfere with state sovereignty, raised initially by way of defense in the courtroom, were quickly taken up by the Democrats on campaign platforms and in the halls of Congress.

Rather than back away from the confrontation with the states represented by the 1866 Act, Congress took an even more drastic step to make clear that state sovereignty was subject to civil rights: it passed the 14th Amendment and enacted the Military Reconstruction Act of 1867, which substituted federal military rule for the governments of ten southern states and conditioned restoration of statehood on ratification of the 14th amendment.[2]

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[2] Dimond, *Strict Construction and Judicial Review of Racial Discrimination under the Equal Protection Clause: Meeting Raoul Berger on Interpretivist Grounds*, 80 Mich.L.Rev.462, 478 (1982). Even the legal scholar upon whom Respondents primarily rely, RBr 44-45, agrees that at the time the 14th Amendment was ratified, "the concept of state sovereignty had no place in American political life." Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 Col.L.Rev. 1413, 1463 (1975), *see* generally *id.* at 1460-63.

The adoption of the 14th Amendment brought an apparent victory for human rights in the closing years of the 1860s with an end to most overt official state deprivations of civil rights. However, the 1871 Congress was faced with a new problem: underground southern resistence led with flaming crosses and hidden under the hoods of the KKK.[3] It was Sections 2-4 of the Act that were designed to respond to this problem and thus were the focus of debate. Section 2 was aimed directly at the KKK, creating civil and criminal liability against entirely private persons who conspired to deprive citizens of their civil rights. Sections 3 and 4 authorized the selective displacement of state government by federal military rule in areas dominated by the KKK. In order to justify these sections, the Republicans needed to stretch their 14th Amendment enforcement mandate to cover *apparently private action which had the practical effect of destroying civil rights*. Their theory was ambitious and controversial: that disorder created by private persons but uncontrolled by state authorities was the equivalent of "state action" which deprived citizens of equal protection. In contrast, Section 1 of the Bill was uncontroversial precisely because it created liability for "pure" state action of the type found in this case: unconstitutional state legislation and actions pursuant to such legislation taken by state officers in an official capacity. See RA 45a-49a, 69a-72a, 96a-97a. Indeed, compared with the impact on state sovereignty of the 1866 Act, the Military Reconstruction Act of 1867, and the other sections of the 1871 Act, Section 1 was merely, as one proponent described it, "a mild civil remedy." RA 79a.

Therefore, in interpreting references to Section 1 in the debates, we must remember that the speakers were

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[3] One result of the KKK campaign was the Republican Party's loss of control over a number of state governments by 1871, thus removing the possibility of partisan sympathy for southern states among the proponents of the Act suggested by Respondents, RBr 14. See RA 12a, 151a.

almost always arguing for or against other sections of the Act. The proponents of the Act primarily discussed Section 1 as an irrefutable first step in an argument leading to the expanded notion of state action underlying Sections 2-4. They pointed out that it was both necessary and proper to extend liability for state action to individual state officials in order to reach the state. RA 80a-81a, 87a, 130a-132a.[4] Having then established that individuals *as well as* states could be the subject of 14th Amendment enforcement, they used Section 1 as a springboard to reach private individuals who caused the same type of harm as state actors. RA 86a. To defeat this logic, opponents of Sections 2-4 attempted to limit the concededly constitutional Section 1 to only conduct attributable to the state as a corporate entity, such as legislation. RA 47a, 106a, 111a, 112a, 128a.

Respondents would have the Court view this legislative history through the distorting lens of the *Ex parte Young* fiction and thus read the debates exactly backwards. The proponents did *not* justify Section 1 on a theory that they could only submit a state officer to liability if he were "stripped" of his official capacity. Just the opposite – it was their opponents who suggested the idea that a state officer loses his official capacity when he acts contrary to the Constitution, in order to break down the analogy made by the Republicans between the Section 1 and Section 2 and limit state action to conduct actually attributable to the state as an entity. The proponents' response was to *reject* a *Young*-type fiction and insist, by reference to the corporate concept, on an identity of state and officer, *especially* where, as here, the

[4] However, the proponents did *not* think that they were creating a remedy *only* against individuals as made clear by their assertions that the broadest terms were used in Section 1 because Congress had the *duty* to create a remedy coextensive with the full scope of 14th amendment rights. RA 52a, 74a, 75a, 76a, 99a, 122a, 124a, 132a, 146a. Cf. Senator Thurman's opposing speech, RA 121a.

officer enforces an unconstitutional law. *See* colloquy between Senators Thurman and Edmunds, 125a-132a.

A prime example of this "backwards" reading of the debates is found in the brief of the National Governors' Association et al ("NGA"), where these amici offer Representative Blair's speech as "powerful evidence" that "legislators asserted the bill was unconstitutional because the States were *excluded* from its proscriptions." NGA Br 20.[5] Blair objected to the Bill, *not* because he thought *Section 1 excluded states* – he explicitly presumed that it applied only to the states "in their corporate and legislative capacity or character and to those acting under their laws", RA 47a, 48a – but because *Section 2 included individuals* without linking their actions to state authority, RA 45a.[6]

Respondents and their amici borrow their "backwards theory" from a pre-*Monell* article by Professor John Nowak, in which he initially acknowledged that many of the statements in the debates "might indicate that state governments were to be held financially responsible under what is now section 1983." Nowak, *supra* n.2 at 1465. He attempted to refute this obvious reading, saying that it takes the statements "out of context." *Id.* However the "context" in which he placed the legislative history was based on the "backwards" interpretation of Blair, *id.*

[5] Despite their use of the plural, "legislators," the NGA amici only cite to a single sentence spoken by *one* legislator.

[6] The quote used by the NGA amici is "The language [of the 14th Amendment] is 'No State' shall do this or that. Individuals *nor a combination of individuals* are mentioned, and yet they are to be brought under the provisions of the bill and the 'State' is to be exempted." RA 46a (emphasis added). The phrase "a combination of individuals" clearly refers to the conspiracy language of Section 2, which does not apply by its terms to state actors.

at 1465 n.252, 1467, and on misreadings of three other quotes that refer to Section 2, not Section 1.[7]

II. RESPONDENTS MISCHARACTERIZE THE APPLICABLE PRINCIPLES OF STATUTORY CONSTRUCTION.

Under a plain language reading, Section 1 clearly applies to the Director of Michigan State Police, as he is a person who under color of state law deprived Petitioner of rights secured by the Constitution. In seeking to avoid the plain language application of Section 1, Respondents also ask the Court to reject the two other most obvious

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[7] Nowak asserted that a statement by Rep. Bingham that "the federal government could punish men and not states for a violation of its laws seems to be of general application." Nowak at 1467. In fact, the context of the quote shows clearly that Bingham's use of "punish" was limited to the imposition of criminal penalties. RA 27a-28a. Bingham was obviously defending Section 2, the only section of the Bill at that time with penal provisions. His point was that in order for Congress to use the powerful deterrent force of criminal law, it was necessary to punish individuals since states as entities obviously could not be criminally prosecuted and imprisoned. Bingham made the same point a few paragraphs earlier in the same speech. RA 25a. Nothing in Bingham's speech supports Nowak's conclusion that Bingham saw the *civil* as well as the criminal sections of the bill as applying only to individuals. Nowak at 1465. Nowak made the assertion that whenever Bingham said "State" he really meant "individual," yet Bingham carefully and repeatedly referred to the bill as applying to individuals *and* States. See RA 20a, 21a, 23a, 24a, 26a. *Cf.* Rep. Poland, RA 148a. Nowak misread a similar statement by Rep. Burchard about needing to *punish* men, Nowak at 1466 n.254, which is also clearly a defense of the criminal penalties imposed on private individuals by Section 2. RA 86a. In Nowak's third quote, Nowak at 1467, also cited by Respondents, RBr 47, the speaker, Rep. Coburn, is arguing that opponents of the Bill should not oppose Section 2 because it reaches individuals, pointing out that "[t]o punish a particular individual [under Section 2] is less troublesome than to set aside a whole State government [under Section 3]." RA56a. *Id.*

guides to interpreting Section 1: its expressed purpose and the rules of statutory drafting in effect at the time. The explicit purpose of Section 1, stated in its title, was to enforce the provisions of the 14th amendment, provisions which refer only to "states." Further, the same Congress which enacted Section 1 only two months earlier declared by the Act of February 25, 1871, 16 Stat 431, ch 71, ("the Dictionary Act") that "person" presumptively included "bodies politic," which, as Respondents concede, was commonly understood to include states. See RA 106a, 111a, 132a. Respondents argue that the definition used by the 42nd Congress in 1871 should be ignored because the 43*rd* Congress amended the Dictionary Act in 1874. There is no evidence that the 43rd Congress intended to "retroactively clarif[y]," RBr 10, the scope of Section 1 by its amendment of the Dictionary Act.[8]

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[8] The 1874 amendment to the Dictionary Act was part of the massive reenactment of legislation which became the Revised Statutes of 1874. The Revised Statutes were debated only in the House, where the members of the Committee on Revision fervently assured Congress that the Revised Statutes were "an exact transcript, an exact reflex of the existing statute law," 43rd Cong, 1st Sess, Globe 646 (Rep. Poland), and that "there is not known to the committee a change of a syllable or of a comma of the statutes so as to change their effect," *id.* 820 (Rep. Hoar). The committee went so far to read on the floor of the House every section of the Revised Statutes where a language change had been made; although a change in the definition of "vessel" in the Dictionary Act was disclosed and debated, *id.* at 822-23, no mention was ever made of the deletion of "bodies politic" from "person." Respondents' only evidence of intent to change the definition of "person" is drawn from the *Revision of the United States Statutes as Drafted by the Commissioners Appointed for that Purpose* ("Commissioners' Draft"). As explained in the Official Introduction ("Introduction") to the Commissioners' Draft, that draft is *not* the legislative history of the Revised Statutes and indeed was *rejected* by Congress because it "included too many substantial changes."

(Continued on following page)

Even the 1874 definition was not "specifically designed to prevent application of the word "person" to state governments," as Respondents contend. RBr 10. The definitions of the Dictionary Act, both before and after amendment, were not exhaustive or exclusive; they simply listed certain meanings that are to be presumptively *included*. This Court has repeatedly found that states are included within statutory definitions of "person" substantially identical to the 1874 definition. *See Ohio v. Helvering*, 292 U.S. 360, 370 (1934); *California v. United States*, 320 U.S. 577, 585 (1944).

Respondents attempt to invoke a "sovereign-exception rule of statutory construction", relying on *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979). But Respondents fail to acknowledge the post-*Wilson* case of *Jefferson County Pharmaceutical Assoc. v. Abbott Laboratories*, 400 U.S. 150, 155-162 (1983) (State of Alabama is a "person" suable under the Robinson-Patman Act), in which this Court made clear that the sovereign-exception rule exempts only the sovereign that enacts the statute. *Id.* at 161 n.21 (no reason for extending the rule to exempt "a *state* from the otherwise applicable provisions of *an act of Congress*, all-embracing in scope and national in its purpose, *which is as capable of being obstructed by state as by individual action.*" *Id.* (emphasis added) (quoting *United States v. California*, 297 U.S. 175, 186 (1936). This Court

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RA 153a. The sole document submitted to the 43rd Congress was a later draft which purported to eliminate all substantive changes in prior law made in the Commissioners' Draft. 43rd Cong, 1st Sess, Globe 821 (Rep. Poland). See also *id.* at 826 (Rep. Lawrence). Therefore, if the legislative history indicates anything, it suggests that the deletion of "bodies politic" was a change made by the Commissioners that simply was not noticed by Congress. "As is noted in all standard treatises on legal bibliography, [the Revised Statutes] caused much dissatisfaction because of many errors as well as suspicion that the revisors had frequently exceeded their authority." "Introduction," RA 152a.

expressly distinguished *United States v. Cooper*, 312 U.S. 600 (1941), relied on in *Wilson*, as a case where the exempted sovereign was the United States, 400 U.S. at 161 n.21, and held that even in the absence of any legislative history showing an intent to create liability against a state that the "plain language" of "persons" was broad enough to include states, *id.* at 157, 159 n.18.

III. THE EXISTENCE OF STATE COMMON LAW SOVEREIGN IMMUNITY IN 1871 SHOULD HAVE NO EFFECT ON THE PROPER CONSTRUCTION OF THE TERM "PERSON" IN THE PRESENT CASE.

The Michigan Supreme Court used a historically inaccurate picture of *Eleventh Amendment* immunity in 1871 to conclude that Congress intended to exclude state defendants from the "person" definition. See PBr 38-44.[9] Respondents make essentially the same argument utilizing an equally inaccurate version of *common law sovereign immunity* of states from suit in their own courts.

A. Common law sovereign immunity has never been understood to be a bar to a federal constitutional claim in state court.

There can be no doubt that under *current* law, state common law sovereign immunity cannot constitute a bar

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[9] Respondents misread this historical discussion as an argument that this Court's "Eleventh Amendment jurisprudence is incorrect." RBr 62. Petitioner does not argue that any of this Court's Eleventh Amendment decisions, past or present, are wrong. He argues simply that the *Hans* decision, by extending the sweep of that Amendment to bar federal constitutional claims by a citizen against his or her own state, was a *change* from what Congress would have understood the law to be twenty years earlier in 1871. If Petitioner is correct, then Congress could have felt no constitutional compulsion to exclude states from the definition of "person". None of these arguments challenge the propriety of *Hans* or of this Court's decision, in *Quern v. Jordan*, 440 U.S. 332 (1979), imposing a "retroactive" clear intent requirement for abrogating Eleventh Amendment immunity.

to a federal constitutional claim brought in state court. See *Martinez v. California*, 444 U.S. 277, 284 n. 8 (1980)("[c]onduct by persons acting under color of state law which is wrongful under 42 U.S.C. §1983 . . . cannot be immunized by state law.") See also *Monell v. New York Department of Social Services*, 436 U.S. 658, 695 n.59 (1978); *Owen v. City of Independence*, 445 U.S. 622, 647 n.30 (1981); *Felder v. Casey*, ___ U.S. ___, 108 S.Ct. 2303, 2313-14 (1988).[10] It follows of course that a state's sovereign immunity – outside the context of the Eleventh Amendment – has no federal constitutional status. *Nevada v. Hall*, 440 U.S. 410, 414 (1979) (no source in any "express[] . . . provision of the Constitution" nor is it "implicitly" supported "by reference to the common understanding that no sovereign is amenable to suit without its consent").[11]

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[10] Indeed, in words particularly appropriate to the issue in the present case, this Court in *Martinez* went on to observe that "[a] construction of [§1983] which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise . . . ." 444 U.S. at 284 n.8. Accord: *General Oil Co. v. Crain*, 209 U.S. 211 (1908) ("If a suit against state officers is precluded in the national courts by the Eleventh Amendment to the Constitution, and may be forbidden by a State to its courts, . . . it must be evident that an easy way is open to prevent the enforcement of many provisions of the Constitution, and the Fourteenth Amendment, which is directed at state action, could be nullified as to much of its operation." 209 U.S. at 226. See also *Poindexter v. Greenhow*, 114 U.S. 270, 303 (1884) (state cannot take away remedies "for the enforcement of a [federal constitutional] right" since that would "take away the right itself"). *General Oil* was decided the same day as *Ex parte Young*, 209 U.S. 123 (1908), and it is significant that the Court saw no need to resort to the *Young* fiction.

[11] Of couse, if state sovereign immunity did have the constitutional status that the Eleventh Amendment enjoys, this Court could not have spoken of its confidence that "the judges who serve on the state courts" would enforce federal claims

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Repondents candidly admit that it is *their* burden to show that a *different* state of the law was a "well-recognized jurisprudential principle" in 1871. RBr 65. In fact, they cannot meet that burden.

It is important to emphasize that the only form of immunity that the 42nd Congress would have worried about in passing §1983 is a state's immunity in its courts from suit on *federal constitutional* claims.[12] In *Kawananakoa*

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against states that were barred in the federal courts by the Eleventh Amendment. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238 n.2 (1985). See also PBr at 34-35. Significantly, *Hall* was decided the same day as *Quern v. Jordan*, 440 U.S. 332 (1979), which dealt with the "*constitutionally guaranteed* immunity of the several States" from suit in *federal* court under the Eleventh Amendment. *Quern*, 440 U.S. at 342 (emphasis added). See *Hall*, 440 U.S. at 414 ("all of these [Eleventh Amendment] cases . . . concern questions of *federal-court jurisdiction* and the extent to which the states, by ratifying the Constitution and creating federal courts, had authorized suits against themselves in *those* courts." *Id.* at 420-421 (emphasis added). *See also Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 99-100 (1984) (noting the special "problems of federalism inherent in making one sovereign appear against its will in the courts of the other", quoting *Employees v. Missouri Dept. of Public Health and Welfare*, 411 U.S. 279, 294 (1973) (Marshall, J., concurring); and *Employees*, *id.* ("issue of general immunity of the States from private suit [is] a question of the common law").

[12] Treatises espousing the principle of state sovereign immunity also contain strong statements regarding the supremacy of federal law that would be antithetical to the reach of sovereign immunity argued by Respondents. For example, Story, in the edition cited by Respondents, writing at a time when federal question cases were almost exclusively handled by state courts, observed that that head of jursidiciton "rests on the obvious consideration that there ought always to be some constitutional method of giving effect to constitutional

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v. Polybank, 205 U.S. 349, 353 (1907), Justice Holmes, citing Hobbes and treatises from the 16th and 17th centuries, observed that "[a] sovereign is exempt from suit . . . on the logical and practical ground that there can be no legal right *against the authority that makes the law on which the right depends.*" (emphasis added). This means that a state is immune from suits for violations of rights of its own creation, but that immunity has no effect on suits for violations of rights created by a higher authority.[13] Significantly, in none of the cases cited by Respondents has this Court squarely held that a federal constitutional claim in a state court was barred by state sovereign immunity. See generally Wolcher, *Sovereign Immunity and the Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violations*, 69 Cal. L. Rev. 189, 262-265 (1981) (collecting and discussing cases).

A common law immunity from suit on federal constitutional claims would not likely have been well-established before 1871 for the additional reason that suits against states in state court for violation of federal rights before 1871 were rare. This was so because, before ratification of the Fourteenth Amendment, there were few

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provisions. What, for instance, would avail restrictions on the authority of the State legislatures, without some constitutional mode of enforcing the observance of them?" 2 J. Story, *Constitution of the United States* 1641 at 433 (3d ed. 1858).

[13] In 1868, Cooley explained how state sovereignty in a federal system is different than in a unitary system. He observed that sovereignty *usually* "extends to all the subjects of government within the territorial limits occupied by the associated people which compose it". T. Cooley, *Constitutional Limitations* 2 (1868). *"In American constitutional law, however,* there is a division of the powers of sovereignty between the national and State governments by subjects: the *former being possessed of supreme, absolute, and uncontrollable power over certain subjects throughout all the States and territories,* while the States have the like complete power, within their respective territorial limits, over other subjects." *Id.* (emphasis added).

federal constitutional limitations on the states and those that did exist usually arose in suits between private parties. See, e.g. *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819) (Contracts Clause). Thus, Congress' efforts to enforce the prohibitions against states set forth in the recently-ratified Fourteenth Amendment involved a problem with little parallel in history.

Moreover, at least three successful Contracts Clause claims against states in state courts reached this Court during that time. See *New Jersey v. Wilson*, 11 U.S. (7 Cranch.) 164 (1812) (Marshall, Ch. J.)(suit in New Jersey courts to annul a tax assessment for its violation of the Contracts Clause); *Woodruff v. Trapnell*, 51 U.S. (10 How.) 190 (1850)(Contract Clause suit to compel officer of state bank to accept repudiated state bonds); *Curran v. Arkansas*, 56 U.S. (15 How.) 304 (1853), discussed *infra* this brief, p. 17.[14]

In addition, as this Court explained in *Owen v. City of Independence*, 445 U.S. 622 (1980), the 42nd Congress would have known that, when performing governmental functions a *"municipality* was *an arm of the state,* and when acting in that 'governmental' or 'public' capacity, *it shared the immunity traditionally accorded the sovereign."* *Id.* at 644-645 (emphasis supplied).[15] If the very state sovereign

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[14] Indeed, success in state courts on federal claims was notable enough that this Court relied on those cases to bolster its conclusion that the *Eleventh Amendment* should not bar similar suits in the *federal* courts. In *Davis v. Gray*, 83 U.S. 203 (1873) (see PBr 40-41), this Court relied on *Woodruff* and *Curran*. See *id.* at 221. See also *id.* at 232 (citing *New Jersey v. Wilson*). *Davis* also relied on the fact that an identical action had been successfully prosecuted against the state of Texas in the *Texas* courts. See 83 U.S. at 222-223 and *Railroad Co. v. Comm. of Land Office*, 36 Tex. 382 (1872).

[15] See 18 McQuillin, *Municipal Corporations* 53.24 at 279 (3d ed. 1984). Michigan law is in accord. See *Nicholson v. City of Detroit*, 129 Mich. 246, 258-59, 88 N.W. 695, 700 (1902): "like the

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immunity under discussion was not enough to lead the 42nd Congress to exclude *municipal* agencies of the state from the definition of "person", then it is no reason for excluding *departmental* agencies and officers of the state, such as Respondents, from that definition.[16]

B. The 42nd Congress need not have expressed specific intent to override common law sovereign immunity in order to include state defendants within the term "person".

First, even though Congress knew that state "sovereign immunity insulates the municipality from unconsented suits", *Owen*, 445 U.S. at 647, no specific intent was required to find that they were "persons" in *Monell*. "By including municipalities within the class of 'persons' subject to liability for violations of the federal Constitution and laws, Congress – the supreme sovereign on matters of federal law – abolished whatever vestige of the state's sovereign immunity the municipality possessed." 445 U.S. at 647-648. For abrogation of *Eleventh Amendment*

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State, [municipality] enjoys immunity from responsibility in case of injury to individuals . . .. In imparting a portion of its powers, the State also imparts its own immunity." See also *id.* at 254 (city officers "do not represent the city, but the State.") citing *Murray v. Village of Grass Lake*, 125 Mich. 2, 83 N.W. 995 (1900). There is no doubt that most §1983 suits would involve governmental functions. The distinction between states and municipalities for Eleventh Amendment purposes, of course, was not made clear by this Court until 20 years after §1983 was passed. See *Lincoln County v. Luning*, 133 U.S. 529 (1890).

[16] Indeed, *Monell* drew support for its holding from the assumption that official capacity suits against state officers *were* encompassed within 1983. Under "dual sovereignty" concepts of the day, "there was no distinction of constitutional magnitude between officers and agents – including corporate agents – of the State: Both were state instrumentalities and the State could be impeded no matter over which sort of instrumentality the Federal Government sought to assert its power." 436 U.S. at 682. See also *id.* n.43.

immunity, simply "including [states] within the class of 'persons' subject to liability" under §1983 is *not* sufficient. See *Atascadero State School and Hospital v. Scanlon*, 473 U.S. 234 (1985) and *Quern v. Jordan*, 440 U.S. 332 (1979) (discussed in PBr 36-37). Simple inclusion, without more, *is* sufficient to preempt the state's common-law sovereign immunity.

Second, since state sovereign immunity is like any other state-law based impediment to a federal claim, no special intent to abrogate is needed. There was no requirement that such specific intent be shown in *Testa v. Katt*, 330 U.S. 386 (1947) or any of the FELA cases in which this Court held state-law impediments to be preempted. See, e.g., *Brown v. Western Ry. Co.*, 338 U.S. 294 (1949). Indeed, given the wide variety and versions of state laws, procedures, doctrines, and policies that might potentially interfere with assertion of a federal claim in state court, it would be an impossible burden to require that Congress anticipate and specifically decide which ones it intends to preempt every time it authorizes a new federal claim. This Court has never imposed that requirement for FELA and other federal claims, nor has it done so for §1983. See, e.g., *Patsy v. Board of Regents*, 457 U.S. 496 (1982) (state administrative remedy exhaustion rule); *Felder v. Casey*, ___ U.S. ___, 108 S.Ct. 2302 (1988) (state notice-of-claim requirement); *Maine v. Thiboutot*, 448 U.S. 1 (1980) (state prohibition against awarding attorney fees).[17]

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[17] In *Thiboutot*, this Court relied on very general intent regarding the applicability of §1988 in state court and apparently saw no need to respond to the comment of the Maine Supreme Court that "it seems extraordinary that Congress would enact a statute affecting the authority of states to control costs in their own courts without stating explicitly its intention to do so." *Thiboutot v. State*, 405 A. 2d 230, 239 (Maine Sup. Jud. Ct. 1979).

C. Congress could not have thought that a state's sovereign immunity barred a constitutional claim where, as here, that state's Supreme Court has determined that it does not.

As the opinion of Justice Boyle below notes, the Michigan Supreme Court abolished Michigan's sovereign immunity in *Pittman v. City of Taylor*, 398 Mich. 41, 247 N.W.2d 512 (1976). See Pet. App. at 106a.[18] Moreover, a majority of the Michigan Supreme Court below held that Michigan's sovereign immunity would, in any event, be no bar to constitutional claims for damages asserted against the state in Michigan courts. See opinion of Boyle, J., concurred in by Cavanagh, J., Pet. App. 109a, ("The primacy of the constitution must eclipse the power of immunity to countenance constitutional violations by the state without concomitant liability.") and opinion of Archer, J., concurred in by Levin, J., *id.* at 122a ("Neither sovereign immunity nor statutory immunity should bar relief when the state allegedly has violated the constitutional rights of its citizens.").[19]

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[18] See also *Williams v. City of Detroit*, 364 Mich. 231, 111 N.W.2d 1 (1961). There is some question whether Michigan's immunity from suit in its own courts even existed in 1871. See Cooperrider, *The Court, The Legislature, and Governmental Tort Liability in Michigan*, 72 Mich. L. Rev. 187, 187 (1973)(immunity "did not exist in 1850" and "was imported into the law of Michigan in the first two decades of the twentieth century"). Though the Michigan legislature has since *Pittman* and *Williams* established statutory governmental immunity, a majority of the Michigan Supreme Court below held that the statute "does not by its terms, declare immunity for unconstitutional acts by the state." See Pet. App. at 106a. Moreover, Respondents even "fail[ed] to argue that, assuming a constitutional violation has been alleged, statutory immunity bars recovery." Pet. App. at 105a.

[19] The reasoning used by the Michigan court would, of course, apply equally to federal and state constitutional claims. Cf. *Testa v. Katt*, 330 U.S. 386 (1947).

In *Curran v. Arkansas*, 56 U.S. (15 How.) 304 (1853), this Court affirmed a state court's entry of judgment against the state on a federal constitutional claim in words that perfectly describe this case:

> That the State of Arkansas is capable of being sued, has been decided, after careful examination, by the Supreme Court of that State, in this suit; and as this is purely a question of local law, depending on the constitution and statutes of the State, we follow that decision, and hold, in conformity therewith, that by its own consent the State had become liable to a decree in favor of the complainant in this suit, if the complainant has a valid ground entitling him to the relief prayed.

Id. at 309.[20]

IV. RESPONDENTS' APPROACH OF DEFINING "PERSON" IN TERMS OF ELEVENTH AMENDMENT OR COMMON LAW SOVEREIGN IMMUNITY IS UNSUPPORTED BY AUTHORITY AND IS IRRATIONAL.

A. Respondents' view results in improper bifurcation of a definitional term with no basis in history or reason.

Respondents' and their amici's argument necessarily contemplates that "person" will vary depending on the nature of the relief sought, a result at odds with the non-bifurcation rule of *Kenosha v. Bruno*, 412 U.S. 507 (1973) (see PBr 29). Not only are they unable to find any other instance where this Court has employed such an

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[20] Professor Hart has commented that, when state courts handle federal claims, "federal law takes the state courts as it finds them." Hart, The Relations Between State and Federal Law, 54 Colum. L. Rev. 489, 508 (1954). Though the comment is usually argued (and rejected) as a justification for state procedural requirements that *limit* federal claims in state court, see, e.g., *Felder v. Casey, supra*, 108 S.Ct. at 2313, it provides a good rule for situations such as the present case, where the state court is *more* hospitable to the federal claim than the federal court can be.

approach,[21] in their effort to escape it, they adopt positions that are untenable.

First, they assert incredibly that *Ex parte Young*-type suits for prospective injunctive relief are "personal-capacity actions." NGA Br 30 n.20. But they do not explain how a later director of the Illinois welfare department can be held liable in his "personal capacity" for illegal action taken by a predecessor in office, see *Edelman v. Jordan*, 415 U.S. 651 (1974), *Quern v. Jordan*, 440 U.S. 332 (1979), and Pet. Br. at 28 n.17, or how the Governor of Michigan can be ordered in his "personal capacity" to draw millions of dollars from the state treasury. See *Milliken v. Bradley*, 433 U.S. 267 (1977). *Young*-type suits under 1983 can only be official capacity suits.

Second, Respondents seek to attribute to the 1871 Congress the modern distinction between prospective and retroactive relief, presumably asserting that Congress would have understood that it was authorizing only prospective official capacity liability when it authorized suits against "person" officers. To get around the fact that *Ex parte Young*, 209 U.S. 123 (1908), came 37 years after §1983 was debated, they assert that the *Young* fiction was really established much earlier. But if this is so, it was not reflected in the "restatement" of Eleventh Amendment law set forth in the substantially contemporaneous case of *Davis v. Gray*, 83 U.S. (16 Wall.) 203, 220 (1873) (discussed PBr 40-41), which reflects a completely different theory. *Davis* observed the then-prevailing Eleventh Amendment titular-party rule under which official capacity suits were permitted against state officers and, notwithstanding the Eleventh Amendment, "the court may proceed to decree against the officers of the State *in all respects as if the State were a party to the record.*" *Id.*

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[21] *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979), for example, would be of much more assistance to Respondents if it held that a bifurcated definition applied, e.g., that in a land dispute where *ejectment* is sought against it, the state is a "white person", but in a *trespass* action against it, a state is not a "white person".

(emphasis added). See generally Orth, *The Interpretation of the Eleventh Amendment, 1798-1908: A Case Study in Judicial Power*, 1983 Ill. L. Rev. 423, 428-431. A Congress with this understanding of Eleventh Amendment jurisprudence would have viewed its authorization of "an action at law [and] suit in equity" against "persons" acting "under color of" state law, as including official capacity suits against officers where the full impact of the judgment was to be borne by the state itself. See also Justice Powell's concurrence in *Monell*, 436 U.S. at 707 (quoted PBr 30).

B. Respondents' seek to create a form of "immunity" for state defendants that is broader than that provided by the Eleventh Amendment or common law sovereign immunity.

Respondents asserted below in defense that state sovereign immunity barred constitutional claims, but lost. See discussion *supra* this brief at 16. Respondents could not assert the Eleventh Amendment as a defense below since "[n]o Eleventh Amendment question is present . . . where an action is brought in a state court". *Maine v. Thiboutot*, 448 U.S. 1, 9 n.7 (1980). What Respondents seek here is unfair "double-dipping": they want to be able to assert Eleventh Amendment and sovereign immunity as defenses for what they are *actually worth plus* some *erroneously broad* supposed 1871 version of those immunities *via* a redefinition of "person".

Whatever its feelings were about state sovereignty, the 42nd Congress surely was not *so* solicitous of states that it would have wished to give them *broader* protection from suit than the Eleventh Amendment or state sovereign immunity actually provided them at time of suit. Moreover, if, as Respondents assert, Congress believed that Eleventh Amendment or common law sovereign immunity *would* bar §1983 suits, it would have thought it *superfluous* to reflect those immunities in its definition of the cause of action. It is far more likely that the 42nd Congress sought, in framing §1983, to authorize a cause of action *simpliciter* against "persons" and assumed that,

if any of those defendants believed that Eleventh Amendment or common law sovereign immunity would bar the claim authorized, they could assert them in defense and the matter would be decided in *that* posture by the court handling the case.

In creating this cause of action, it is clear that the 42nd Congress was aware that there would be concurrent jurisdiction in state courts. The applicable rule then (as now) is that state courts have concurrent jurisdiction over federal claims "in every case in which they were *not expressly excluded* by the . . . acts of the national legislature". *The Federalist No. 82* (A. Hamilton) at 493 (Rossiter ed. 1961) (emphasis added). This very passage was even quoted during the debates. See Globe 661 (Sen. Vickers) RA 108a-109a; see also Globe 514 (Rep. Poland) and Cert. Pet. at 24.[22] There is no reason to think that Congress wished, in using the term "person", either to disrupt the usual way that defenses are asserted in courts or to expand their content. It cannot be reasonably maintained that either Eleventh Amendment or state common law sovereign immunity defense applies *directly* to bar the present claim. Respondents should not be allowed to maintain that they are nonetheless "immune" *indirectly* through a tortured redefinition of "person".

Respectfully submitted,

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PAUL D. REINGOLD

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[22] Moreover, Congress demonstrated its ability in the other post-Civil War civil rights acts to provide for exclusive federal court jurisdiction when it wished to do so and gave clear indication that it understood the precise difference between exclusive and concurrent jurisdiction. See Civil Rights Act of 1875, §3, 18 Stat. 335 ("the district and circuit courts of the United States shall have, exclusively of the courts of the several States, congnizance of all . . . violations of[] the provisions of this act"). See also Civil Rights Act of 1866, §3, 14 Stat. 27, ch 31.

REPLY APPENDIX

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

LEGISLATIVE HISTORY OF THE CIVIL RIGHTS ACT OF 1871 CITED BY PETITIONER, RESPONDENTS, AND RESPONDENTS' AMICI

MARCH 23, 1871

PRESIDENT GRANT'S MESSAGE TO CONGRESS REQUESTING EMERGENCY LEGISLATION

236 During the delivery of Mr. SCOTT's speech the following message was received from the President of the United States:

To the Senate and House of Representatives:

A condition of affairs now exists in some of the States of the Union rendering life and property insecure, and the carrying of the mails and the collection of the revenue dangerous. The proof that such a condition of affairs exists in some localities is now before the Senate. That the power to correct these evils is beyond the control of the State authorities I do not doubt; that the power of the Executive of the United States, acting within the limits of existing laws, is sufficient for present emergencies is not clear. Therefore I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States. It may be expedient to provide that such law as shall be passed in pursuance of this recommendation shall expire at the end of the next session of Congress. There is no other subject on which I would recommend legislation during the present session.

U. S. GRANT.

WASHINGTON, D, C., *March* 23, 1871.

MARCH 28, 1871

INTRODUCTION OF BILL IN THE HOUSE
BY REP. SHELLABARGER

* * *

68A In my opening remarks upon this measure I shall not attempt to consider at all that state of the country which is supposed by a portion of the people, and by the President of the United States in his recent message, to require additional legislation of the kind provided for in this bill. I shall confine myself to a consideration of the qualities of this bill, its relations to the Constitution, our power to enact it, and, if I have time, the justness and wisdom of the measure.

In the first section of this bill it is provided—

That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities to which, as such citizen, he is entitled under the Constitution or laws of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, &c.

My first inquiry is as to the warrant which we have for enacting such a section as this. The model for it will be found in the second section of the act of April 9, 1866, known as the "civil rights act." That section provides

68A a criminal proceeding in identically the same case as this one provides a civil remedy for, except that the deprivation under color of State law must, under the civil rights act, have been on account of race, color, or former slavery. This section of this bill, on the same state of facts, not only provides a civil remedy for persons whose former condition may have been that of slaves, but also to all people where, under color of State law, they or any of them may be deprived of rights to which they are entitled under the Constitution by reason and virtue of their national citizenship.

The first inquiry, then, is naturally where is the constitutional authority, or, if you please, where is the constitutional impediment authorizing or preventing such legislation? It is absolutely plain that if it was constitutional to pass the second section of the civil rights bill, then it is equally competent to pass into law this first section of this bill. Why do I say that? Because the same exact right is involved in each case. The constitutional right upon which it was competent to enact the second section of the civil rights bill was this: the civil rights bill was passed to enforce the provisions of the thirteenth article of amendments to the Constitution of the United States—was passed in virtue of the two provisions of that thirteenth amendment, one of which reversed and overthrew the State constitutions creating slavery and prohibited the States from "denying" the slaves citizenship, turned them into citizens; and the other, being the second section

68A of that amendment, gave Congress power to enforce this first provision by "appropriate legislation;" or, in other words, to enforce the rights of citizenship to which the slave was admitted by the act of his emancipation.

That act, and I need not delay longer upon it, has already passed under the review of the supreme courts of at least three States of this Union, and I do not know of how many more; also under review of the circuit court of the United States of the district of Kentucky. Justice Swayne, in his opinion in that last-named case, an opinion exceedingly elaborate, exceedingly exhaustive, exceedingly able, sums up his conclusions by saying, "We have no doubt of the constitutionality of every provision of this act."

The exact legal effect of these decisions, sustaining the constitutionality of the civil rights bill, is to declare that the result of two constitutional provisions, one saying that the States shall not make citizens slaves, and the other saying that Congress may, by appropriate legislation enforce the first provision, is to authorize Congress to define and punish as a crime against the United States any act of deprivation of the rights of the newly made American citizenship. That is the point, effect, and result precisely of these adjudications. If that is law, then that is the end of the discussion as to the right of Congress to pass this first section, because, surely, if the thirteenth amendment did so much as this, the

68A far more explicit, complete, and careful provisions of the fourteenth much more did it by declaring all our people United States citizens; declaring that no State shall make or enforce any law abridging their privileges or immunities as such; declaring that the States shall not deny them equal protection of these equal laws, and then declaring that Congress shall have power, by appropriate legislation, to enforce the enjoyment of these privileges of citizenship by seeing to it that the laws do not abridge them nor the States withhold protection to them.

Then, Mr. Speaker, there is no doubt, there can be no rational doubt, of the right to enact the first section of this bill, provided the civil rights bill and the adjudications under that bill in the several States and in the circuit court of the United States be in accordance with a just judicial interpretation of the Constitution in that regard. And how can there be a doubt about a question like that? To say in our Constitution that all our people in the States shall be United States citizens, and also citizens of the States; to add this as a curative, new and additional part of the instrument, and in it to say that State laws shall not be made or enforced to abridge these rights of United States citizens nor the States deny protection of these rights under law, and that Congress may enforce these provisions securing these rights, and then to say that Congress can do no such thing as make any law so enforcing these rights, nor open the United States

68A courts to enforce any such laws, but must leave all the protection and law-making to the very States which are denying the protection, is plainly and grossly absurd.

The section being in its terms carefully confined to giving a civil action for such wrongs against citizenship as are done under color of State laws which abridge these rights, it goes directly to the enforcement of that provision which says the State shall not make or enforce any law which shall abridge any privileges or franchises of citizens.

With these remarks in regard to the constitutionality of the first section, I have a single remark to make in regard to the rule of interpretation of those provisions of the Constitution under which all the sections of the bill are framed. This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. It would be most strange and, in civilized law, monstrous were this not the rule of interpretation. As has been again and again decided by your own Supreme Court of the United States, and everywhere else where there is wise judicial interpretation, the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people. These provisions of the fourteenth

68A amendment are wholly devoted to securing the equality and safety of all the people, as is this section, and, indeed, the entire bill. In deciding whether the section or the bill is warranted by this fourteenth amendment, ought not the fact that it is so eminently just and fair, so eminently in accordance with the spirit of our institutions, so wholly devoted to the single and sublime work of preserving the rights and liberties and government of all the people, and which gives not a power, except such as is, by the language employed, carefully confined and consecrated to the sacred duty of protecting the people and their Government, to have mighty weight in determining the question of the power to make it? Chief Justice Jay and also Story say:

"Where a power is remedial in its nature there is much reason to contend that it ought to be construed liberally, and it is generally adopted in the interpretation of laws."—1 *Story on Constitution*, sec. 429.

In the great case of Gibbons *vs.* Ogden (9 Wheat.) the Supreme Court were urged to decide that the powers held by the United States as against the States, in virtue of the clause giving power to make all laws necessary and proper to carry into execution the granted powers, were only such as would be given under a strict construction of these words. The words of Marshall in reply were: "There is not one sentence in the Constitution which prescribes this rule. We do not, therefore, think ourselves justified in adopting it." And it is with infinite force that Mr. Story reminds them who

throughout our history have striven to deprive
68A the United States of its just powers for the defense of the people and the Union, and to leave all power and sovereignty in the States, since the Union was formed "to establish justice, insure domestic tranquillity, to provide for the common defense, promote the general welfare, and to secure the blessings of liberty to the people and their posterity;" that—

"It would be mockery to ask whether these are odious objects." * * * * * "What peculiar sanctity have the State governments in the eyes of the people beyond these objects? Are they not framed for the same general ends? Was not the very inability of the State governments suitably to provide for our national wants, national independence, and national protection, the very ground-work of the whole system?"—1 *Story on Constitution*, section 415.

Surely, having in mind the beneficent purposes of the fourteenth amendment, and construing it in the light of these rules laid down by Marshall and Story, you do find in that amendment that power for protection of the citizens of the United States which this first section invokes.

I now come to the second section of the bill.

* * *

69A This, sir, is the foundation idea on which this section and the whole bill rest for their constitutional warrant. If right, it solves every possible doubt and difficulty in every part of this great inquiry. The United States added to its

69A Constitution what was not in it before; because never before was it found in the Constitution in express words that all people in this country were citizens of the United States as well as of the States. This was added, and added for a purpose.

But the addition did not stop there. It was also added that no State should make or enforce any law abridging those rights of citizenship then first declared by express constitutional enactment. But they did not stop there. In the abundance of caution they added that no State should deprive them of life, liberty, or property without due process of law. Nor did they stop there, but added that the State should not deprive any person within its jurisdiction of the equal protection of the laws. And they did not stop there yet, but in still more abundant caution added that Congress should have power by appropriate legislation to enforce these provisions. What provisions? Why, sir, the provisions that we are all citizens of one, and but one, Republic. More than that. That we all have, as such, privileges and immunities. More than that. These privileges and immunities shall not be abridged. More than that. That under the laws of the Union and the States there should be exact equality upon the face of the laws; they should not abridge rights. More than that. That under these laws, so equal, the States should not deny

69A equal protection. More than that. That Congress should have power to make laws appropriate to secure all that was meant by and included in all this more than trinity of "provisions" that we are all United States citizens; that our laws shall, as to us all, be equal: that we shall all have due process of law, and all equal protection under these equal laws.

Putting all these constitutional elements together, Mr. Speaker, where is the doubt Congress may, by appropriate legislation, protect those rights of American citizenship so solicitously and so abundantly guarded and guarantied and made eternal as the Constitution itself? If, after all this transcendent profusion of enactment in restraint of the States and affirmative conferment of power on Congress, the States still remain unrestrained, the complete, sole arbiters of power, to defend or deny national citizenship—to make laws abridging or not abridging, to protect or to destroy, by banded murder, these United States citizens as the State may please, and the United States must stand by a powerless spectator of the overthrow of the rights and liberties of its own citizens, then not only is the profusion of guards put by the fourteenth amendment around our rights a miserable waste of words, but the Government is itself a miserable sham, its citizenship a curse, and the Union not fit to be.

* * *

70A I must not, therefore, be told, as an answer to my argument, that there is no legislation executing those other provisions of the Constitution denying powers to the States, as, for example, those providing that no State shall make any law impairing the obligation of contracts or make treaties, and all those similar prohibitions. The fact that there has been no legislation upon those subjects, as I have already said, is simply because there has been no need of any. The decision of the Supreme Court of the United States, striking down the State laws which attempted to invade those provisions of the Constitution, ended the State legislation. But that would not do where personal rights were invaded by the States. Hence Congress has never hesitated to provide the necessary affirmative legislation to enforce the personal rights which the Constitution guaranties, as between persons in the State and the State itself. There is the distinction. In my mind our legislative and judicial history renders our position wholly impregnable. So long as your Constitution continues to guaranty the rights of American citizenship, so long you can "by law," to adopt the language of the fifth section of the fourteenth amendment, enforce these rights of American citizenship.

* * *

SPEECH BY REP. STOUGHTON IN SUPPORT OF THE BILL

* * *

Can any one, Mr. Speaker, contemplate these disclosures without surprise and well-founded
321 alarm? Yet, sir, the Democratic party have from the first denied, and then palliated and excused these outrages. In Tennessee and other southern States the laws which had been passed by Republican Legislatures to suppress and punish the Ku Klux were repealed as soon as the Democratic party came into power. The relation of the Democracy to this order is precisely that of the receiver of stolen property to the thief. The murder of leading Republicans, terrifying the colored population, and putting whole neighborhoods in fear so that the Ku Klux can control an election, is heralded as a Democratic victory.

For the purpose of showing that it is well understood where these outrages are committed that the Democratic party is willing and anxious to receive the benefits of murder and rapine, I cite the testimony of W. P. Bynam, the solicitor of the ninth judicial district of North Carolina, found on page 54 of the Senate report:

* * *

321 The whole South, Mr. Speaker, is rapidly drifting into a state of anarchy and bloodshed, which renders the worst Goverr ment on the face of the earth respectable by way of comparison. There is no security for life, person, or property. The State authorities and local courts are unable or unwilling to check the evil or punish the criminals. It is not a question of power or numbers. If the cowardly miscreants who conceal their crimes by hideous disguises, the dark pall of night and the darker pall of perjury, would give the loyal people of the South an open field and a fair fight they would protect themselves. But, sir, the Ku Klux system is ingeniously devised for the express purpose of enabling a few bad men to intimidate the masses of the people, to avoid any conflict with the military power, and to
322 control the State courts and local authorities by perjury and fraud.

* * *

MARCH 29, 1871

SPEECH BY REP. WHITTHORNE
IN OPPOSITION TO THE BILL

* * *

336 With courage, alacrity, and cheerfulness he went to work to repair his individual fortune, to build up waste places, to restore order, to aid his neighbor and the public; in fine, to perform all the duties of the laborious, useful, citizen. How was this spirit met? Pause and look at the picture. Special courts and tribunals, hitherto unknown to the law, were organized, and his rights made subject thereto. He was deprived of the right to hold office, even the most petty; he was cut off from the highest badge of American citizenship, the right to vote; all motives of individual exertion were taken away from him, and the negro, his inferior, invested with them and made his superior. In all this there was much to provoke him; yet, sir, he submitted. He saw his State government and its high offices, as well as its lowest tribunals, pass into the hands of parties who had no identity with the soil, the institutions, the property, or the people of the State; parties who, taking advantage of his weakness and the supposed hostility of the national Government to him, had organized the negroes into secret political clubs, holding out to them plunder of and dominion over him, inculcating them with the idea that the white man was their oppressor, and for hundreds of years had outraged them, thus raising the worst of passions; and who, by and through such machinery, had seized hold of the State governments; and

336 who, so possessing themselves of the State governments, for jobs and corrupt purposes and corrupt individual corporations, levied enormous taxes and created enormous debts; so that to-day the spectacle is presented of multiplied bankrupt States. Think for a moment, Mr. Speaker, of the volume of increased indebtedness and increased taxes put upon these people, and answer me, if it is at all wonderful that corrupt Governors should be impeached, that these people should be restive at the call of the tax-gatherer? Think for a moment of the condition of your American white brother, disarmed, lorded over by the ignorant, thriftless black, who, the slave and tool of miserable tricksters and plunderers, yet flaunts his freedom in that brother's face. Can you wonder that his blood will occasionally outrun his judgment?

* * *

MARCH 31, 1871

HOUSE OF REPRESENTATIVES

SPEECHES IN SUPPORT OF THE BILL

78A

Enforcement of Fourteenth Amendment.

SPEECH OF HON. A. F. PERRY,

OF OHIO,

IN THE HOUSE OF REPRESENTATIVES,

March 31, 1871.

The House having under consideration the bill (H. R. No. 320) to enforce the provisions of the fourteenth amendment to the Constitution of the United States, and for other purposes—

Mr. PERRY, of Ohio, said: ***

Where these gangs of assassins show themselves the rest of the people look on, if not with sympathy, at least with forbearance. The boasted courage of the South is not courage in their presence. Sheriffs, having eyes to see, see not; judges, having ears to hear, hear not; witnesses conceal the truth or falsify it; grand and petit juries act as if they might be accomplices. In the presence of these gangs all the apparatus and machinery of civil government, all the processes of justice, skulk away as if government and justice were crimes and feared detection. Among the most dangerous things an injured party can do is to appeal to

78A justice. Of the uncounted scores and hundreds of atrocious mutilations and murders it is credibly stated that not one has been punished. Such is a brief outline of the condition of things which we are called upon to meet.

* * *

81A

Enforcement of the Constitution and Laws of the United States and the Rights of the People.

SPEECH OF HON. J. A. BINGHAM,

OF OHIO,

IN THE HOUSE OF REPRESENTATIVES,

March 31, 1871.

The House having under consideration the bill (H. R. No. 320) to enforce the provisions of the fourteenth amendment to the Constitution of the United States, and for other purposes—

Mr. BINGHAM said:

Mr. SPEAKER: No man is equal to the task of discussing, as it ought to be discussed, the issue before this House within the limits of a single hour. I scarcely hope that I shall have done more than touch the hem of the garment of the argument when my hour shall have expired. But, sir, whatever I may fail to do, the great people behind me will not fail to supply. They, sir, constitute the tribunal before whom this issue is on trial.

81A It is the old issue with which the people have become familiar within the last ten years. It presents itself, sir, this day only in another form. In substance it is precisely the issue which was presented ten years ago upon this floor, and was discussed ably and exhaustively upon this side of the House and upon that. The question then, sir, and the question now, is, whether it is competent for the Congress of the United States, under the Constitution of the United States, in pursuance of its provisions, and in the exercise of the powers vested by it "in the Government of the United States or in any department or officer thereof," to provide by law for the enforcement of the Constitution, on behalf of the whole people, the nation, and for the enforcement as well of the Constitution on behalf of every individual citizen of the Republic in every State and Territory of the Union to the extent of the rights guarantied to him by the Constitution.

Until this issue was raised, in 1860–61, the constitutional power of Congress to provide for the common defense and the enforcement of the Constitution and laws of the United States had not been seriously questioned in this House. Now, as then, this power, essential to the nation's life and the safety of the people, is here challenged. It amazes me that, after all that has transpired in this country for the final settlement of this very question, gentlemen on either side of the House would dare to open it again. It has been settled by your courts of justice; it has been settled by the repeated action of your Congress within the

81A last ten years; it has been settled by the people themselves, by the ballot and by battle, by laws and by arms; and from their decision thus made there cannot rightfully lie an appeal. And yet gentlemen substantially again open this question to-day.

The question as presented here and now may be stated thus: is it competent for Congress to provide by law for the better enforcement of the Constitution and laws of the United States and the better security of the life, liberty, and property of the citizens of the United States in the several States of the Union? The Constitution is not self-executing, therefore laws must be enacted by Congress for the due execution of all the powers vested by the Constitution in the Government of the United States, or in any department or any officer thereof. No man can successfully deny the power of Congress so to legislate, for it is expressly provided in the Constitution that "Congress shall have power to make all laws which shall be necessary and proper for carrying into execution" the powers therein expressly granted to Congress, "and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

* * *

82A Notwithstanding the express grant of power in the Constitution, and the rulings of Marshall, and this legislation of the First Congress, gentlemen still aver that Congress cannot constitutionally make laws to enforce the rights of the nation against either States or unlawful combinations of men.

* * *

82A Mr. Speaker, having said this much on this subject, I refer to the bill under consideration to say, that I do not propose now to discuss the provisions of the bill in detail. The bill incorporates in general the provisions, adapting them, however, to the existing condition of things, which have been law from the foundation of the Government, and to which I have referred. There may be provisions in the bill pending which are not necessary or proper. If there be, I shall ask the privilege, and I have no doubt it will be accorded to me, to attempt to amend by the favor of the House.

Of the general power of Congress to legislate for the better enforcement of all the powers vested by the Constitution in the Government of the United States, and for the better protection of the people in the rights thereby guarantied to them against States and combinations of individuals, I have no doubt, for the reason that it is a closed question, absolutely closed——

83A Mr. ELDRIDGE. Will I interrupt my friend——

Mr. BINGHAM. The gentleman will excuse me.

Mr. ELDRIDGE. I wish to ask him to apply that second section to his statement and see if it does conform to the provision of the Constitution——

Mr. BINGHAM. I have already stated, Mr. Speaker, that I have spoken of the provisions of the bill in general, and not in detail. I do not propose to be diverted from my line of argument. I have been endeavoring to demonstrate that the legislation of the country in all the past was an exercise of the general power to legislate as proposed by this bill. If it was competent heretofore to give the President power to enforce by arms the faithful execution of the laws against unlawful combinations of men, surely it is equally competent, to make the fact of such combinations a crime punishable in your courts. The powers of the States have been limited and the powers of Congress extended by the last three amendments of the Constitution. These last amendments—thirteen, fourteen, and fifteen—do, in my judgment, vest in Congress a power to protect the rights of citizens against States, and individuals in States, never before granted. It is my purpose, as far as I may be able in the limited time allowed me, to make this statement good.

* * *

84A Mr. Speaker, this House may safely follow the example of the makers of the Constitution and the builders of the Republic, by passing laws for enforcing all the privileges and immunities of citizens of the United States, as guaranteed by the amended Constitution and expressly enumerated in the Constitution. Do gentlemen say that by so legislating we would strike down the rights of the State? God forbid. I believe our dual system of government essential to our national existence. That Constitution which Washington so aptly said made us one people, is essential to our nationality and essential to the protection of the rights of all the people at home and abroad. The State governments are also essential to the local administration of the law, which makes it omnipresent, visible to every man within the vast extent of the Republic, in every place, whether by the wayside or by the fireside, restraining him by its terrors from the wrong, and protecting him by its power, in the right.

Who is there here to say that any State ever

85A had the right to defeat the very object for which all government is made?

* * *

85A Sir, what would this Government be worth if it must rely upon States to execute its grants of power, its limitations of power upon States, and its express guarantees of rights to the people. Admitting that the States have concurrent power to enforce the Constitution of the United States within their respective limits, must we wait for their action? Are not laws preventive, as well as remedial and punitive? Is it not better to prevent a great transgression in advance, than to engage in the terrible work of imprisonment, and confiscation, and execution after the crime has been done? Our fathers in the beginning set us the example of legislating in advance. Yet gentlemen say, now that the Constitution is amended and new powers have been vested in Congress, we must wait until these combinations are made. Why, sir, if we pass this bill and these offenses are not attempted or actually committed anywhere, no man is hurt, no State is restrained in the exercise of any of the powers which rightfully belong to it. Why not in advance provide against the denial of rights by States, whether the denial be acts of omission or commission, as well as against the unlawful acts of combinations and conspiracies against the rights of the people?

The States never had the right, though they had the power, to inflict wrongs upon free citizens by a denial of the full protection of the laws; because all State officials are by the Constitution required to be bound by oath or affirmation to support the Constitution. As I have already said, the States did deny to

85A citizens the equal protection of the laws, they did deny the rights of citizens under the Constitution, and except to the extent of the express limitations upon the States, as I have shown, the citizen had no remedy. They denied trial by jury, and he had no remedy. They took property without compensation, and he had no remedy. They restricted the freedom of the press, and he had no remedy. They restricted the freedom of speech, and he had no remedy. They restricted the rights of conscience, and he had no remedy. They bought and sold men who had no remedy. Who dare say, now that the Constitution has been amended, that the nation cannot by law provide against all such abuses and denials of right as these in States and by States, or combinations of persons?

I respectfully ask my friend from Illinois [Mr. FARNSWORTH] to review all that he has said on this subject. If I am not right in asserting that the negative limitations imposed by the Constitution on States can be enforced by law against individuals and States, then the Government was wrong from the administration of Washington down, and the Supreme Court of the United States was wrong every time this question has come before it.

Let gentlemen consider the last three amendments and the new limitations thereby imposed upon the power of the States, and the new powers thereby vested in Congress. The first of these (the thirteenth) provides that involuntary servitude, or slavery, shall not exist in

85A the United States. That is negative. Then we have the further provision that Congress shall have power to enforce, by appropriate legislation, this amendment. That is affirmative. Do gentlemen undertake to say to day that this does not impose a new limitation upon the power of the States, and grant a new power to Congress?

Does the gentleman from Indiana [Mr. KERR] wish to be understood as affirming that there is no new grant of power here to Congress and no new limitation on the States? I rather think not. Let any State try the experiment of again enslaving men, and we will see, whether it is not competent for the Congress of the United States to make it a felony punishable by death to reduce any man, white or black, under color of State law, to a system of enforced human servitude or slavery; that system which converts a man, endowed with immortal life, into a thing of trade, an article of merchandise, with no acknowledged rights in the present and no hope of a heritage in the great hereafter. In such case the nation would inflict the penalty for this crime upon individuals, not upon States.

Will gentlemen undertake to tell the country that we cannot enforce by positive enactment that negative provision, the thirteenth article of amendment?

We have fully considered the fourteenth amendment. We have seen that it expressly grants the power to Congress to enforce its provisions, all its provisions, by appropriate

85A legislation. Consider the fifteenth amendment, which declares, "No State shall deny to any citizen of the United States the right to vote on account of race, color, or previous condition of servitude." Here is a negative provision, a mere limitation, like the thirteenth and fourteenth amendments, on the power of the States, but coupled with a grant of power to Congress to enforce it. Did not a large majority of this House vote for the enforcement act of last May, which set aside the constitutions as well as the statutes of half the States of the Union because they denied rights guaranteed to citizens by this negative provision, and which also declared combinations in States to deprive citizens of their rights, felony, punishable in the courts of the United States? I undertake to say, as to those sections of that law which enforce this provision and define and provide for the punishment of conspirators against the guarantied rights of the people, that there has never been found in America, anywhere, a court weak enough or wicked enough to question their validity, not one.

I am not speaking of all the details of that act. I am speaking of the provisions of it which declare that the right shall not be denied, nor challenged, nor violated by individuals or States. What difference is there between enforcing the negative provision of the fifteenth amendment and enforcing a negative provision of the thirteenth and fourteenth amendments? There is no difference, sir. No man can find any difference. There the three new amendments stand, imposing limitations,

85A as I have said, upon the powers of the States which never were imposed on them before, and granting to the Congress of the United States express powers which never were in Congress before.

Mr. Speaker, I respectfully submit to the House and country that, by virtue of these amendments, it is competent for Congress to-day to provide by law that no man shall be held to answer in the tribunals of any State in this Union for any act made criminal by the laws of that State without a fair and impartial trial by jury. Congress never before has had the power to do it. It is also competent for Congress to provide that no citizen in any State shall be deprived of his property by State law or the judgment of a State court without just compensation therefor. Congress never before had the power so to declare. It is competent for the Congress of the United States to-day to declare that no State shall make or enforce any law which shall abridge the freedom of speech, the freedom of the press, or the right of the people peaceably to assemble together and petition for redress of grievances, for these are of the rights of citizens of the United States defined in the Constitution and guarantied by the fourteenth amendment, and to enforce which Congress is thereby expressly empowered. It is clear that if Congress do so provide by penal laws for the protection of these rights, those violat-

86A ing them must answer for the crime, and not the States. The United States punishes men, not States, for a violation of its law.

Mr. Speaker, I do not fear what the judgment of the people will be on this great question. I only regret that I cannot more fully discuss it or more clearly present it. I feel that my strength is well-nigh exhausted. I trust I have said enough to demonstrate the power of this Government to enforce the Constitution and protect the people in their rights of person and property.

* * *

86A Mr. Speaker, in this discussion I have been necessarily compelled to speak of the powers of the national Government and of the powers of the States, and have referred only incidentally to the provisions of the Constitution guarantying rights, privileges, and immunities to citizens of the United States. I pray, Mr. Speaker, that the House will not misunderstand me as placing the Government, either national or State, above the citizen. I ask the House, when they come to deliberate upon this question, not to forget the imperishable words of our great Declaration, "All men are created equal and endowed by their Creator with the rights of life and liberty." I ask gentlemen not to forget those other words of the Declaration, that "to protect these rights" (not to confer them) "governments are instituted among men." I ask gentlemen further, when they come to deliberate upon this ques-

86A tion, not to forget the words incorporated by its makers in the Constitution of our common country, by which it is declared that, to establish justice and to secure the blessings of liberty, "We, the people of the United States, do ordain this Constitution."

Liberty secured by law is not license. Liberty, our own American constitutional liberty, is the right "to know, to argue, and to utter freely according to conscience." It is the liberty, sir, to know your duty and to do it. It is the liberty, sir, to work in an honest calling and contribute by your toil in some sort to the support of yourself, to the support of your fellowmen, and to be secure in the enjoyment of the fruits of your toil. Justice, sir, to establish which this Constitution was ordained, the people themselves being witness, is to give to every man his due. The justice to be established by the Constitution is the attribute of God, as to do justice is the perpetual obligation of men and nations. Let justice for all, by the power and majesty of American law be established for all, so that the poorest man in his hovel on the frontiers of your widely extended domain, bearing with him toward the setting sun the symbols of civilization, and laying in the wilderness the foundations of new commonwealths, may be made as secure in his person and property as the prince in his palace or the king on his throne.

Let equal and exact justice be established, that America may become the exemplar to all the nations of the world of the capacity of

86A man for self government, and in establishing it may illustrate the utterance of that grand intellect, Collard, of whom one of the most gifted of living men said:

"His words become indelibly engraved upon what ever spot they fall. 'The citizen,' said he, 'has a higher destiny than that of States.'"

* * * * * * * * * *

"'States are born, live, and die upon the earth; here they accomplish their destiny; but they contain not the whole man. After the citizen has discharged every obligation he owes to society, every obligation that he owes to the State, there abides in him the nobler part of his nature—his immortal faculties, by which he ascends to God, to a future life, and to the unknown blessings of an invisible world.'"

[Applause.]

SPEECHES IN OPPOSITION
TO THE BILL
REP. SWANN

* * *

362 The Freedmen's Bureau was a power. Governors of States were inaugurated without regard to residence or locality, having no common interests with those over whom they were called to preside. Bogus judges, who had never read the first page of Blackstone, dragged the ermine from the shoulders of those who had previously dispensed the laws. Strong-minded women, with assurance of reward, hurled their anathemas against treason and preached from the pulpit the duties of loyalty. Broken-down school-masters from the New England States, resurrected under the new dispensation, rolled about in their stately equipages. Property was

362 seized and appropriated without license, and the necessities of poor men, unable to help themselves, were levied upon by the tax-gatherer or the land shark. Such was a picture of the South under the tender guardianship of the Republican party.

* * *

362 Had these States been promptly reconstructed, as they should have been, how different would have been the picture to-day? Hundreds of millions of money would have been saved to the people, of which the Treasury would have received its fair proportion in imposts and taxation. For years past the people of the South have been resting with their hands before them in the expectation of a brighter future. They have become sick and disheartened. Their material interests have been neglected. Their great works of internal improvement, so necessary to their development, have been retarded and in many instances abandoned altogether. Immigration has ceased almost entirely. Capital, driven from their borders by the unsettled condition in which they are held, has sought other and more prosperous channels of employment. I feel that I am not without authority, therefore, in saying that the blighting policy of reconstruction, which has been so long persevered in by the Republican party from the close of the war to the introduction of the bill now before this House, has entailed a loss more than equal to the expenses of the war.

* * *

REP. ARTHUR

* * *

364 What, sir, is the meaning of this iteration? Why are the ultra-Republican leaders absorbing every hour and day of this Congress in agitating with the false clamor of Ku Klux? It is, sir, to divert the attention of the people from the abuses of the Administration of which they are complaining, and from the reforms which they are demanding. It is, sir, for the purpose of turning the adverse tide of popular elections in Republican favor. It is, sir, for the purpose of arbitrarily controlling or silencing the suffrages of the Democratic masses in the ensuing presidential election in the southern States. Desperate diseases, sir, require desperate remedies; and it is most obvious at the capital and through the country that the tumors and abscesses of the Republican party are rapidly encroaching upon the seat of its official vitality.

From the commencement of the present session of this Congress the gentleman from Massachusetts [Mr. BUTLER] vainly endeavored to introduce and bring forward his bill upon the subject of alleged disorders in the South. That bill was most atrocious in its character. It shocked every conservative Republican in this House, and many of the bolder sort hesitated to give it countenance. But, unabashed by all these unfriendly manifestations, the author adhered first to his bill and finally to the spirit and substance of it

364 (when he found he could not get its form and details) with the audacity, subtlety, and tenacity for which he is distinguished as a Republican leader. It seemed to us, on this side of the House, that the better genius of the Republican party would prevail, and that malevolence, factiousness, and imposture would be discountenanced.

* * *

365 Proposed legislation by Congress is properly subjected to two cardinal tests, namely: first, is it constitutional; second, is it expedient? I shall not now go into the constitutionality of this section. It is cumulative, as far as it goes, with certain provisions in the civil rights bill. The opinion of the country is formed upon that bill. I believe it to be a flagrant violation of the spirit and letter of that revered instrument. We are aware that it has undergone to some extent judicial construction in State and Federal judicatures; that its constitutionality has been affirmed on the one hand and denied on the other; and that the Supreme Court has not as yet, so far as I am advised, passed upon it. It is therefore an open question, and is at least of doubtful constitutionality, and therefore to be condemned.

But having the section subjected to the second cardinal test, to wit, is it expedient? it must upon the slightest reflection fall under the sternest condemnation of the jurist, the statesman, the philanthropist, of every lover of the divine and political axiom of peace and

365 good will to men. It overrides the reserved powers of the States. It reaches out and draws within the despotic circle of central power all the domestic, internal, and local institutions and offices of the States, and then asserts over them an arbitrary and paramount control as of the rights, privileges, and immunities secured and protected, in a peculiar sense, by the United States in the citizens thereof. Having done this, having swallowed up the States and their institutions, tribunals, and functions, it leaves them the shadow of what they once were. They are nominally what they should be as of sovereign right. And so long as they remain servile, suppliant, and subservient, the mailed hand of central power is stayed. But if the Legislature enacts a law, if the Governor enforces it, if the judge upon the bench renders a judgment, if the sheriff levy an execution, execute a writ, serve a summons, or make an arrest, all acting under a solemn, official oath, though as pure in duty as a saint and as immaculate as a seraph, for a mere error of judgment, they are liable, and most certain, at the suit of any knave, plain or colored, under the pretext of the deprivation of his rights, privileges, and immunities as a citizen, *par excellence*, of the United States, to be summarily stripped of official authority, dragged to the bar of a distant and unfriendly court, and there placed in the pillory of vexatious, expensive, and protracted litigation, and heavy damages and amercements, destructive of health and exhaustive of means, for the benefit of unscru-

365 pulous adventurers or venal minions of power.

Hitherto, in all the history of this country and of England, no judge or court has been held liable, civilly or criminally, for judicial acts, and the ministerial agents of the law have been covered by the same ægis of exemption. Willfulness and corruption in error alone created a liability; and the judiciary has always

366 remained in justice and equity, in intellect and learning, in freedom and in courage, far, far uplifted above the turmoils, the passions, and the vicissitudes of parties and partisan creeds, the central orb of the highest civilization, and the sheet-anchor of law and order. But no tribunal is sacred in the eye of existing usurpation, and every character, however excellent, must go down under the baleful progress of despotic power. Under the provisions of this section every judge in the State court and every other officer thereof, great or small, will enter upon and pursue the call of official duty with the sword of Damocles suspended over him by a silken thread, and bent upon him the scowl of unbridled power, the forerunner of the impending wrath, which is gathering itself to burst upon its victim.

But I can dwell on this section no longer, and I hasten on to section two:

That if two or more persons shall, within the limits of any State, band, conspire, or combine together to do any act in violation of the rights, privileges, or immunities of any person, to which he is entitled under the Constitution and laws of the United States, which, committed within a place under the sole and exclusive jurisdiction of the United States, would, under any law of the United

366 States then in force, constitute the crime of either murder, manslaughter, mayhem, robbery, assault and battery, perjury, subornation of perjury, criminal obstruction of legal process or resistance of officers in discharge of official duty, arson, or larceny, and if one or more of the parties to said conspiracy or combination shall do any act to effect the object thereof, all the parties to or engaged in said conspiracy or combination, whether principals or accessories, shall be deemed guilty of a felony, and upon conviction thereof shall be liable to a penalty of not exceeding $10,000, or to imprisonment not exceeding ten years, or both, at the discretion of the court: *Provided*, That if any party or parties to such conspiracy or combination shall, in furtherance of such common design, commit the crime of murder, such party or parties so guilty shall, upon conviction thereof, suffer death: *And provided also*, That any offense punishable under this act, begun in one judicial district of the United States and completed in another, may be dealt with, inquired of, tried, determined, and punished in either district.

This section, like the first, absorbs the entire jurisdiction of the States over their local and domestic affairs: the first section as to civil rights and remedies, and the second as to wrongs and punishments; and it broadly asserts the same exclusive and plenary authority and jurisdiction in Congress and the United States courts over these subjects in and over all the States which the Federal Government possesses over places acquired by the consent of the States "for the erection of forts, magasines, arsenals, dock-yards, and other needful buildings."

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SPEECH OF REP. SHELDON IN SUPPORT OF THE BILL

367 M. SHELDON. Mr. Speaker, in considering the bill which has been reported by the special committee of which the gentleman from Ohio [Mr. SHELLABARGER] is chairman, the question which meets us at the threshold is the constitutional power of Congress to enact it into a law. From the beginning of the Government to this day there have been disputes upon some question or other as to the extent of the powers of the General Government. Complaint on the one hand that the Government was a "mere rope of sand," and fear on the other of too much centralization, the tendency of every Government to increase its authority, and jealousy of the dignity and supremacy of the State governments, have kept the nation in a turmoil of disputations, without having fixed in the public mind the point where the authority of the State governments end and where that of the national Government begins. In consequence of our dual system it is probable that we shall always have conflicting opinions on this subject.

My fear of centralization and despotism is not so great as my apprehension of confusion and anarchy. The right to live, to own and possess property, and exercise the civil and political franchises, are the dearest interests of mankind, and it is the highest duty of the Government to provide means to protect and secure every citizen in the undisturbed enjoyment of these rights. The Government of

367 the United States was established not merely to declare the true principles of liberty, but to provide for their maintenance and perpetuation. It would be gravely defective if it were not empowered to enforce respect for all the declared rights of its citizens. The power to protect ought to correspond with the extent of the rights conferred. Whether the General Government possesses the powers which it seems it ought to possess is the question.

* * *

367 The rights of the citizens have been more specially defined, if not enlarged, by the late amendments, and there is certainly conferred upon Congress the power to enforce them by legislation. It must be apparent that these amendments enlarge the power of the Government in controlling the action of the States, and I believe that it can extend its powers,

368 through its courts, in times of peace, directly to the individual citizen who is deprived of his rights, privileges, and immunities, whether through the positive act or the default of the State authorities.

* * *

SPEECH BY REP. LOWE IN SUPPORT OF THE BILL

* * *

374 That life and personal rights are insecure and systematically invaded in several of the States may be palliated, but cannot be successfully denied. The evidence is contained in the voluminous report of the Senate committee elicited from a crowd of witnesses; and it is also brought to us by the public press and by the mouths of those who speak of what they know and have seen.

While murder is stalking abroad in disguise, while whippings and lynchings and banishment have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective. Combinations, darker than the night that hides them, conspiracies, wicked as the worst of felons could devise, have gone unwhipped of justice. Immunity is given to crime, and the records of the public tribunals are searched in vain for any evidence of effective redress.

* * *

APRIL 1, 1871

SPEECH BY REP. WADDELL
IN OPPOSITION TO THE BILL

* * *

377 I will describe to you in a few words the true condition of the people of North Carolina after the war, and their experience during the past five years of Republican rule, while under the absolute control of "the party of progress and great moral ideas," and I will say at the outset that no party in the history of this country ever had such an opportunity to perpetuate its power by intrenching itself behind impregnable lines, and no party ever so utterly wasted its opportunities and so covered itself with disgrace. Coming out of the great struggle like a strong man exhausted by fever, the State lay prostrate and helpless. I shall not insult the intelligence of the House by dwelling on the evils attending the annihilation of the entire labor system of a country at a single blow, nor shall I harrow my own feelings by a recital of the sufferings and humiliations to which our people were subjected. Suffice it to say that they presented a con-

377 dition which demanded, if not the experiment of active charity, at least the privilege of exemption from further molestation. They had complied with all that was required of them by the Government, and only desired to rebuild, as best they might, their waste places. The public debt of the State, principal and interest, was about seventeen million dollars, an immense sum to people so impoverished as they were.

* * *

377 They took charge of all the departments of the State government, and after multiplying officers *ad infinitum* under a constitution entirely new to the people; after wiping out the judicial system which had become venerable, and to which the people were attached, even descending in a spirit of petty revenge to the business of changing the names of localities offensively; after destroying the State University without substituting anything in its stead, and after many similar preliminaries, they increased the State debt at a single bound to the comfortable figure of $55,000,000 for the purpose of building railroads and developing resources generally—a legislative feat which was accomplished by the judicious expenditure of $200,000 by a loyal gentleman in the establishment of a free bar-room in the capitol, with peanuts thrown in. Ten millions of this debt having been declared unconstitutional by the supreme court, there was still left and now

377 stands a debt of $25,000,000. No railroad has been built, and the money was used by a loyal gentleman named Littlefield, from Pennsylvania, and an enterprising native named Swepson, partly I believe in buying out the State of Florida from a gentleman from Wisconsin.

SPEECH BY REP. SHOBER
IN OPPOSITION TO THE BILL

379

* * *

Sir, I repel the slanders which have been uttered here or elsewhere against them. They have suffered much; they have been despoiled of their political rights by strangers; they have been ruined, plundered, made bankrupt by a Government not of their own choosing, and placed over them by force; they have been outraged in their homes, in their property, in their honor; they have suffered by the hands of the murderer and the incendiary; they have borne such an accumulation of trials and burdens as would have driven any other people to desperation. And yet, sir, they have held their souls in patience through it all, and with a heroism beyond all praise have religiously kept the peace. There is not to-day a more orderly and law-abiding people anywhere than the people of North Carolina.

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SPEECH BY REP. LEWIS
IN OPPOSITION TO THE BILL

* * *

385 Mr. Speaker, it is not my intention to discuss at much length the constitutional questions presented by this bill, but I shall content myself with a few general observations on that branch of the subject; for its palpable violations of that instrument have been clearly shown by gentlemen who have preceded me. This bill is but a continuation of the series of acts passed by Congress since the war, forming a code of laws, in my judgment, without example for injustice and intolerance in any representative Government. Though of a kindred nature, it is in advance of any step yet taken toward the final result contemplated, which is, in my opinion, nothing less than a consolidated despotism here at the capital, and the absorption by the Federal Government of all the rights and powers of the States, if not an obliteration of State lines.

Sir, this bill is a systematic and apparently studied attack upon our form of government. It destroys essential and necessary safeguards to the life and liberty of the citizen. It ignores the sovereign rights and nullifies the laws of the States, though passed in obedience to the Constitution, and puts in jeopardy the officers of the States, though in the conscientious discharge of their duties, and lodges in the hands of the President powers that cannot be safely intrusted to him or any other one man.

385 By the first section, in certain cases, the judge of a State court, though acting under oath of office, is made liable to a suit in the Federal court and subject to damages for his decision against a suitor, however honest and conscientious that decision may be; and a ministerial officer is subject to the same pains and penalties, though simply executing the process of a State court, about which he has no discretion, and the legality of which he has no right to question.

By the second section the Federal Government ousts the States and assumes jurisdiction of offenses committed within the limits of the States, which have heretofore been left in their exclusive control, and the control of which the Constitution has denied to the United States. * * *

SPEECH BY REP. BLAIR
IN OPPOSITION TO THE BILL

208A

Now we have these three amendments before us, and we will concede that there is power given the General Government in the amendments to enforce them. But, Mr. Speaker, the question is, what power is vested in the General Government over the subject-matter of those amendments? Whatever power is given to the General Government is simply adequate to and commensurate with the amendments; that is to say, to enforce that which is established or that which is prohibited, and nothing more. To do this, Congress must act upon and against that power, person, or thing that

208A can successfully violate the provisions of the amendments.

What is there established by the thirteenth amendment? The liberty of the slave. We have him changed from the condition of slavery to that of liberty. Who is it or what is it that can return the slave back to bondage again? Whatever it is or whoever it is that has the power to return the slave to bondage, then against that power, person, or thing is given to Congress the right to legislate, and against no other. What is it, then, that can remand him back to slavery? Is it the individual act of any one man? Can one or two men, or a dozen men, or fifty men, or a hundred men, by murdering or mistreating the colored people who were slaves return them into bondage again? Why, sir, it is absurd and preposterous to so assert. Nothing but the sovereign power of the State in which he lives can again remand or attempt to remand him to slavery. And hence, whatever power is vested in the United States Congress must be exercised against the State governments and those acting under their laws, and not against individuals who may act without the authority of such laws. Individuals alone cannot enslave.

And so with the fourteenth amendment. It provides that these same persons who once were slaves shall be citizens of the United States and of the States. Who can deprive them of citizenship? Can one or more individuals do it? So with the other provisions contained in the first section of said fourteenth amendment: no State shall deprive any per-

208A son of life, liberty, or property, &c.; and no State shall deny to any person, &c., the equal protection of the laws. The language is "No State" shall do this or that. Individuals nor a combination of individuals are mentioned, and yet they are to be brought under the provisions of the bill and the "State" is to be exempted.

The same may be said of the fifteenth amendment. It enfranchises the colored people and gives them the right to vote; the language is positive and plain:

"The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude."

Here again the inhibition is against the "United States" and the "States." Individuals and persons are not named, and yet they are to be brought under the provisions of the amendment and this bill, and the "United States" and the "States" go free. Is not this most singular legislation—the parties against whom the provision is made left out of the bill, and those not named put in it?

The inhibitions in the amendments against the United States and the States are against them in their corporate and legislative capacities, for the thing or acts prohibited can alone be performed by them in their corporate or legislative capacities.

Again, I ask, can individuals in a State without the aid of State law enslave a colored man? If not, Congress has no jurisdiction over them under the thirteenth amendment.

208A Can individuals take from the colored man his "citizenship?" If not, then Congress has no jurisdiction over them under the fourteenth amendment. Can individuals take the right to vote from the colored man, which was conferred by the Constitution of the United States? If not, Congress has no jurisdiction over them; for surely Congress could not be guilty of legislating against those who are incapable of violating the amendments and fail to legislate against those who can.

As the States have the power to violate them and not individuals, we must presume that the legislation provided for is against the States in their corporate and legislative capacity or character and those acting under their laws, and not against the individuals, as such, of the States. I am sustained in this view of the case by the tenth section of the first article of the Constitution of the United States. In it are a number of inhibitions against the States, which it is evident are against them in their corporate and legislative capacity; and to which I respectfully call the attention of the gentlemen who favor this bill.

If no State, in its corporate capacity or character, is trying or threatening to legislate the colored people back into slavery; if no State is trying to legislate citizenship away from the colored people—and no State is trying to legislate the right to vote away from the colored people—I would not only ask whence the authority for Congress to pass this bill, but whence the necessity for it? Not only is there not any evidence before us, but no one dare arise on

208A this floor and assert that any State in this Union has or is about to deprive or abridge the colored people or white people of any rights guarantied to them by the thirteenth, fourteenth, and fifteenth amendments or any other provision of the Constitution of the United States. "No State shall do this," as remarked by the gentleman from Illinois, [Mr. FARNSWORTH.] This whole legislation must be directed against the States, and not against individuals. It may be contended that the expression "no State" means the same as "individuals." If so, then the States and the United States were with Walker in his filibustering raid into Central America; and also in Canada in the late Fenian raids. But the tenth section, article one, Constitution of the United States, referred to, forever settles what is meant by the expression "no State."

* * *

209A Now, sir, with these remarks before us, I shall hasten to the consideration of the bill. Having shown that the thirteenth, fourteenth, and fifteenth amendments are simply inhibitions of power to the States to legislate, I will now examine the bill by sections, and see how it conforms to those amendments. The first section provides—

"That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United

209A States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress," &c.

The first part of this section seems to contemplate that some State has or is about to legislate so as to abridge the rights conferred by the thirteenth, fourteenth, and fifteenth amendments upon the negroes; but it includes the whites also. As those amendments only apply to those that were slaves and not before citizens, and to the colored persons not before voters, to include any others than them is an assumption of power.

Provisions made to protect negroes in their freedom, citizenship, and right to vote should not be construed to give Congress the power to legislate over assaults and batteries and violations of State election laws. But, strange to say, such is the effect of this section. But as no State has or is likely to pass any such law as contemplated, that section is and will be inoperative, and hurt no one. It is only the assumption of power that I protest against.

We shall now notice the second section.

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APRIL 4, 1871

SPEECH BY REP. BUTLER
IN SUPPORT OF THE BILL

* * *

448 HAS CONGRESS THE CONSTITUTIONAL AUTHORITY TO PASS AND CAUSE TO BE EXECUTED SUCH LAWS?

I do not propose in the fragment of an hour to enter upon the argument of this grave constitutional question. It could not be properly discussed if I devoted the whole time allotted to me; and I am specially debarred from such an undertaking by the learned and able discussion of the two gentlemen from Ohio, [Messrs. SHELLABARGER and BINGHAM,] and my own colleague, [Mr. HOAR,] who said all that could be said upon that subject in the time given to them. But every gentleman should in the quiet of his study carefully examine it, and thus easily satisfy himself. For one, I have no doubt upon it, after much careful and deliberate thought and study of the question, although the Democratic teachings of my early life had trained my mind to lean heavily against any invasion by Federal authority of the peculiar and proper rights of the States.

I may be permitted, however, to give some conclusions to which I have arrived without any considerable detail of the reasoning which led to them.

There seem to me two controlling propositions on this question.

First. If the Federal Government cannot pass laws to protect the rights, liberty, and lives of citizens of the United States in the States,

448 why were guarantees of those fundamental rights put in the Constitution at all, and especially by acts of amendment?

All agree that the mere constitutional assertion of affirmative guarantees not made operative by law, are ineffectual to aid the citizen. How, then, can the citizen avail himself of those constitutional guarantees and affirmative declarations of his rights, if Congress cannot pass laws to make them operative? How can it be an interference with the rights of the States for the laws of the United States to afford that protection to its citizens which the State fails or neglects to do for itself?

Is it one of the rights of a State not to protect its citizens in the enjoyment of life, liberty, and property, and thereby deny him the equal protection of the laws, so that, when the General Government attempts to do for the protection of the citizen what the State has failed to do, is it to be held an interference with the rights of the State? Pardon me; it seems to me that such action is only a necessary and proper interference with the wrongs of a State. A State has no constitutional or other right reserved to itself to deny or neglect to its citizen the equal protection of the laws.

Secondly. If the General Government has not the constitutional power to protect the lives, liberty, and property of its citizens upon its own soil when such protection is needed, then it ought to have such power; it should reside somewhere in the Government. For without the power to protect the lives of its citizens,

448 **a republican government is a failure, and if such be constitutional law, to be a citizen of the United States is to be the most unprotected of all mankind.**

* * *

448 Let me put a case, not altogether a supposed one, to illustrate the absolute absurdity of the doctrine that the Federal Government cannot constitutionally interfere on its own soil to protect the liberty and lives of its citizens.

A British subject is teaching a negro school in Georgia, and is seized, scourged, and imprisoned by a Ku Klux Klan. Demand is made by the queen's Government on ours for his release and indemnity for his wrongs. Under the law of nations and by our Constitution the whole power of the United States, civil and military, must be set in motion at once, if need be, to compel his release, and an appropriation must be made to make good his losses. The failure so to do would be a just cause of war, and we should not do to other nations what we demand at the cannon's mouth they shall do to us. So that under the Constitution, as read by these gentlemen, the rights of a foreigner, when infringed in one of the States, can and must be protected by the whole power of the United States, while our Government is constitutionally impotent to shield its own citizens under like circumstances. Can the absurdity of a Virginia constitutional abstractionist even further go?

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SPEECH BY REP. COBURN
IN SUPPORT OF THE BILL

456 * * *

These men, unwilling to resort to reason, to persuasion, to the power of good example, to the gentle arts of peace, to obtain supremacy, still use the old and vulgar weapons of terror, deceit, conspiracy, whipping, burning, torture, and murder. They have learned no good principles from their hard experience; but, dogged, sullen, deceitful, revengeful, and degraded, they will still struggle against destiny and fight the God of the Universe.

* * *

457 **Since its suppression we have drifted back to the old position; but find an altered state of circumstances, an unusual condition of society. We find that the commission of a certain class of high crimes is not noticed; that the offenders are not arrested, put on trial, or punished, as may best suit the people in certain districts; that there is no liberty of speech or suffrage and no protection to life and property in those places to all equally. We find that, in consequence of the rebellion and the acts of reconstruction, there is a persistent, organized effort to overthrow the law by secret crimes and by systematic perjury in cases**

457 of arrest and trial of those committing them, thus eluding the officers of justice. We find a society, with well-known names, such as the Ku Klux Klans and the White Brotherhood, with officers, with obligations of secrecy, with a large membership, numbering thousands, extending over counties and over States, whose object is to perpetrate these crimes and to screen from punishment others who are guilty. We find that this society is political in its nature, is exclusive in its membership, and is utterly hostile to the Republican party and to the Union of the States, and that its victims are members of that party.

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459 The development of this condition of affairs was not the work of a day or even of a year. It could not be, in the nature of things; it must be slow; one fact to be piled on another, week after week, year after year. At first these masked men seemed to be perpetrating jokes upon the emancipated negroes. Then occasional outrages were revealed. Public attention was arrested, and at length hundreds of cases were chronicled; and a singular feature connected with them was that the civil authorities seemed utterly powerless to obtain convictions for any crimes, however atrocious. All these things could not happen without concert, understanding, and arrangement. It could not be possible that all should be acquitted who were arrested. It could not happen that in some localities a vast number of these crimes

459 were committed and no one arrested. It could not happen that Union men should invariably be the victims and their opponents in politics the wrong-doers. It could happen that Union men who spoke out their sentiments freely should be banished or whipped or burned out or murdered. These things do not occur thus accidentally. It does not merely happen that men who stand by the country and who opposed rebellion and treason should in the administration of justice get none whatever. It does not happen that large classes of men are deprived of the protection of life, liberty, and property without redress and without notice.

Such occurrences show that there is a preconcerted and effective plan by which thousands of men are deprived of the equal protection of the laws. The arresting power is fettered, the witnesses are silenced, the courts are impotent, the laws are annulled, the criminal goes free, the persecuted citizen looks in vain for redress. This condition of affairs extends to counties and States; it is, in many places, the rule, and not the exception.

What, then, can be done? The States cannot or do not act. Some other power must be invoked. Where does it reside? How can it be exercised? Can it be made effectual? These are questions of the gravest import and which are forced upon us by the present circumstances.

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459 It may be safely said, then, that there is a denial of the equal protection of the law by many of these States. It is therefore the plain duty of Congress to enforce by appropriate legislation the rights secured by this clause of the fourteenth amendment of the Constitution. So far it has not been found necessary to do this; but the emergency has at last arisen, and there is but one course to take. How can this thing be done? Shall we deal with individuals, or with the State as a State? If we can deal with individuals, that is a less

radical course, and works less interference with local governments. To punish a particular individual is less troublesome than to set aside a whole State government, declare martial law, suspend the writ of *habeas corpus*, and substitute, generally, national for State authority. Can this be done? Or must the nation in every case of this kind deal with the State alone? Must we allow outrages to proceed till State authority is prostrated? It would seem more accordant with reason that the easier, more direct, and more certain method of dealing with individual criminals was preferable, and that the more thorough method of superseding State authority should only be resorted to when the deprivation of rights and the condition of outlawry was so general as to prevail in all quarters in defiance of or by permission of the local government.

459 In my judgment Congress has both remedies, and can use both or either as the emergency may require. In the matter in hand it is proposed to try the simpler remedy first. Should that fail, a more thorough course is to be adopted.

* * *

459 Obviously the court of justice is the first instrument to be used in aid of the fourteenth amendment; safer, milder, surer, more in accordance with reason, with our system, and with public sentiment. Whenever, then, there is a denial of equal protection by the State, the courts of justice of the nation stand with open doors, ready to receive and hear with impartial attention the complaints of those who are denied redress elsewhere. Here may come the weak and poor and downtrodden, with assurance that they shall be heard. Here may come the man smitten with many stripes and ask for redress. Here may come the nation, in her majesty, and demand the trial and punishment of offenders, when all, all other tribunals are closed. In what other aspect does the power of this nation shine with more benignity? How much better this than the array of armed men, the suspension of civil process, the dread alternative of force!

460 Can these means be made effectual? Can we thus suppress these wrongs? I will say we can but try. The United States courts are further above mere local influence than the county courts; their judges can act with more independence, cannot be put under terror, as local judges can; their sympathies are not so nearly identified with those of the vicinage; the jurors are taken from the State, and not the neighborhood; they will be able to rise above prejudices or bad passions or terror more easily. The marshal, clothed with more power than the sheriff, can make arrests with certainty, and, with the aid of the General Government, can seize offenders in spite of any banded and combined resistance such as may be expected. Thus, at least, these men, who disregard all law, can be brought to trial. Here we stop. The court is to do the rest, acting under all its solemn obligations of duty to country and God. Can we trust it, or are we afraid of our own institutions? Does the grim shadow of the State step into the national court, like a goblin, and terrify us? Does this harmless and helpless ghost drive us from that tribunal—the State that mocks at justice, the State that licenses outlawry, the State that stands dumb when the lash and the torch and the pistol are lifted every night over the quiet citizen? We believe that we can trust our United States courts, and we propose to do so. That is the head and front of our offending. We believe that the effect of this measure will be to restore peace and overawe the conspirators.

460 We believe that the ruffians who prowl in darkness will take warning. We believe that they will vanish, as the birds of night do at the coming sun. We believe that the terrified and humbled friends of the Union will lift up their heads, confident of future safety. We believe that the officers of justice, shielded by the national power, will proceed promptly, without fear or favor, and that the trembling and tottering States will spring up and resume the long-neglected administration of law in their own courts, giving, as they ought themselves, equal protection to all.

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SPEECH BY REP. GARFIELD
IN SUPPORT OF THE BILL

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150A

FIRST SECTION OF THE FOURTEENTH AMENDMENT.

I now come to consider last in order, for it is the basis of the pending bill, the fourteenth amendment. I ask the attention of the House to the first section of that amendment, as to its scope and meaning. I hope gentlemen will bear in mind that this debate, in which so many have taken part, will become historical, as the earliest legislative construction given to this clause of the amendment. Not only the words which we put into the law, but what shall be said here in the way of defining and interpreting the meaning of the clause, may go far to settle its interpretation and its value to the country hereafter.

150A No thorough discussion of this clause is possible which does not include a history of some of the leading facts connected with its origin and its adoption by Congress. I will therefore state briefly the proceedings of this House on the first form of amendment proposed on the subject embraced in the first section of the fourteenth amendment, as it now stands in the Constitution.

THE REJECTED AMENDMENT.

On the 13th February, 1866, Mr. BINGHAM reported, from the joint Committee on Reconstruction, a joint resolution proposing the following amendment to the Constitution of the United States:

"ARTICLE —. The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all the privileges and immunities of citizens in the several States; and to all persons in the several States equal protection in the rights of life, liberty, and property."

The debate proceeded at great length, and the necessity for increased protection to those who had lately been slaves, against the hostile legislation of the States, was strongly urged. I will quote a few paragraphs from the debate, to show some of the leading reasons that were urged for and against the proposition.

Mr. Higby, of California, insisted that this amendment was necessary in order to protect the lives and property of the citizens in the South. He showed how, under the thirteenth amendment, the laws of the States might be so administered as to put black men into slavery under pretense of sentencing them for crime,

150A and that without additional power given to Congress the General Government could not prevent such a result. (Globe, February 27, page 1056.)

Others urged the amendment on the same and similar grounds.

Mr. HALE, of New York, opposed the amendment. He said that under it—

"All State legislation, i.e. its codes of civil and criminal jurisprudence and procedure, affecting the individual citizen, may be overriden, may be repealed, and abolished, and the law of Congress established instead. I maintain that in this respect it is an utter departure from every principle ever dreamed of by the men who framed our Constitution."—*Globe*, page 1063.

On the 28th of February my colleague [Mr. BINGHAM] made a very able and elaborate speech in defense of the amendment. He based its necessity on the fact that Congress had then no power to legislate for life, liberty, and property within the States. He affirmed, also, that the guarantees of the rights of property and person named in the fifth article of amendments to the Constitution were not limitations on the State governments, but only on Congress. To support this position he quoted the case of Barron ex. The Mayor and City Council of Baltimore, (7 Peters, page 247;) also, Lessee of Livingston ex. Moore, (7 Peters, page 251;) also, 3 Webster, page 171; and then said, (Globe, page 1090:)

"The question is simply whether you will give by this amendment, to the people of the United States, the power, by legislative enactment, to punish officials of States for violation of the oaths enjoined upon them by their Constitution."

150A In the course of Mr. BINGHAM'S speech Judge Hale, of New York, asked him—

"Whether, in his opinion, this proposed amendment to the Constitution does not confer upon Congress a general power of legislation for the purpose of securing to all persons in the several States protection of life, liberty, and property, subject only to the qualification that that protection shall be equal."

"Mr. BINGHAM. I believe it does in regard to life, liberty, and property, as I have heretofore stated it, the right to real estate being dependent on the State law, except when granted by the United States.

"Mr. HALE. I desire to know if he means to imply that it extends to personal estate.

"Mr. BINGHAM. Undoubtedly it is true."

Mr. CONKLING, now a Senator from the State of New York, during the same debate said of this amendment:

"It was introduced several weeks ago, and considered in a committee of fifteen. At that time and always I felt constrained to withhold from it my support as one of the committee, and when the consent of the committee was given to its being reported I did not concur in the report."—*Globe*, page 1094.

Mr. HOTCHKISS, of New York, said:

"I understand the amendment, as now proposed by its terms, to authorize Congress to establish uni-

151A form laws throughout the United States upon the subject named, the protection of life, liberty, and property. I am unwilling that Congress shall have any such power."

I have been thus particular in reviewing the history of this debate, in order to show the sentiment that then prevailed in this House in regard to one of the theories which we are asked to adopt in this debate.

151A Now, let it be remembered that the proposed amendment was a plain, unambiguous proposition to empower Congress to legislate directly upon the citizens of all the States in regard to their rights of life, liberty, and property. Mark the action of the House. After a debate of two weeks, the record of which covers more than one hundred and fifty columns of the Globe, and in which the proposed amendment was subjected to a most searching examination, it became evident that many leading Republicans of this House would not consent to so radical a change in the Constitution, and the bill was recommitted to the joint select committee.

Mr. BINGHAM. The gentleman is mistaken. A motion was made to lay that amendment on the table. There were 41 votes in favor of the motion and 110 against it. I voted myself in favor of a postponement; but the measure was not recommitted, for I was a member of the committee and knew what it could do.

Mr. GARFIELD, of Ohio. My colleague is technically right in saying that the measure was postponed. Of course the majority did not allow it to be laid on the table on motion of a member of the opposite party, and the motion was voted down, as my colleague has said. But the consideration of the measure was postponed on motion of Mr. CONKLING, who had opposed it from the start, and it did in fact go back to the committee, and was never

151A again discussed in this House. What is more, it was never debated at all in the Senate, though it was introduced into that body by Mr. Fessenden the same day that Mr. BINGHAM introduced it into the House. The whole history of the case shows that it became perfectly evident, both to the members of the Senate and of the House, after the House debate, that the measure could not command a two-thirds vote of Congress, and for th : reason the proposition was virtually withdrawn. Its consideration was postponed February 28 by a vote of 110 to 37.

THE AMENDMENT AS ADOPTED.

More than a month passed after this postponement, or recommittal, without further action in either House. On the 30th April, 1866, the fourteenth amendment was introduced into the House, and the first section was precisely as it now stands in the Constitution, except that the first sentence of the present text was not in the draft. The new form of amendment was also debated at great length. The gentleman who reported it from the committee, the late Mr. Stevens, of Pennsylvania, said that it came far short of what he wished, but after full consideration, he believed it the most that could be obtained.

Mr. BINGHAM. My colleague will allow me to correct him again. The remark of Mr. Stevens had no relation whatever to that provision, none at all. That is all I have to say on that point now.

151A Mr. GARFIELD, of Ohio. My colleague can make but he cannot unmake history. I not only heard the whole debate at the time, but I have lately read over, with scrupulous care, every word of it as recorded in the Globe. I will show my colleague that Mr. Stevens did speak specially of this very section.

The debate on this new proposition, which afterward became the fourteenth amendment, was opened by Mr. Stevens, May 8th, in a characteristic and powerful speech. He spoke of the difficulties which the joint committee on reconstruction had encountered, and of the long struggle they had had to reach any proposition on which the friends of the amendment could unite. He said:

"The proposition is not all that the committee desired. It falls far short of my wishes, but it fulfills my hopes. I believe it is all that can be obtained in the present state of public opinion. . . . .

"The first section prohibits the States from abridging the privileges and immunities of citizens of the United States, or unlawfully depriving them of life, liberty, and property, or of denying to any person within their jurisdiction the 'equal' protection of the laws.

"I can hardly believe that any person can be found who will not admit that every one of these provisions is just. They are all asserted, in some form or other, in our Declaration or organic law. But the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect and allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate equally upon all. Whatever law punishes a white man for a crime shall punish the black man precisely in the same way and to the same degree. Whatever law protects the white man shall afford 'equal' protection to the black man. Whatever means of

151A redress is afforded to one shall be afforded to all. Whatever law allows the white man to testify in court shall allow the man of color to do the same. These are great advantages over their present codes. Now different degrees of punishment are inflicted, not on account of the magnitude of the crime, but according to the color of the skin. Now color disqualifies a man from testifying in the courts or being tried in the same way as white men. I need not enumerate these partial and oppressive laws. Unless the Constitution should restrain them, those States will all, I fear, keep up this discrimination and crush to death the hated freedmen."—*Stevens*, page 2459.

In the long debate which followed this section of the amendment was considered as equivalent to the first section of the civil rights bill, except that a new power was added in the clause which prohibited any State from depriving any person within its jurisdiction of the equal protection of the laws. The interpretation of this first section, as given by Mr. Stevens, was the one followed by almost every Republican who spoke on the measure. It was throughout the debate, with scarcely an exception, spoken of as a limitation of the power of the States to legislate unequally for the protection of life and property. On the 9th of May Mr. Eliot, of Massachusetts, said:

"I support the first section because the doctrine it declares is right, and if under the Constitution as it now stands Congress has not the power to prohibit State legislation discriminating against any classes of citizens or depriving any persons of life, liberty, and property without due process of law, or denying to any persons within the State the equal protection of the laws, then, in my judgment, such power should be distinctly conferred."—*Page* 2511.

151A Mr. FARNSWORTH approved the amendment but said that the first section might as well be reduced to these words: "No State shall deny to any person within its jurisdiction the equal protection of the laws," for that was the only provision in it which was not already in the Constitution. (Page 2539.)

It is noticeable also that no member of the Republican party made any objection to this section on the grounds on which so many had opposed the former resolution of amendment; but many expressed their regret that the article was not sufficiently strong.

Mr. Shankling, of Kentucky, a Democrat, said:

"The first section of this proposed amendment to the Constitution is to strike down the reserved rights of the States and invest all the power in the Federal Government."—*Page* 2500.

Mr. Rogers, of New Jersey, a Democrat, took similar ground. (Page 2538.)

These are the only declarations I find in the House debates, either by Democrats or Republicans, indicating that this clause was regarded as placing the protection of the fundamental rights of life and property directly in the control of Congress; and these declarations of Shankling and Rogers were general and sweeping charges, not sustained even by specific statement.

I close this citation of speeches on the amendment by quoting the view taken of the scope and meaning of this first section by my

151A

colleague, [Mr. BINGHAM.] He said:

"This section gives power to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by unconstitutional acts of any State.

"Allow me, Mr. Speaker, in passing, to say that this amendment takes from no State any right that ever pertained to it. No State ever had the right, under the forms of law or otherwise, to deny to any freeman the equal protection of the laws, or to abridge the privileges or immunities of any citizen of the Republic, although many of them have assumed and exercised the power, and that without remedy."—*Page* 2542.

After a debate on this new proposition which lasted several days and evenings, the amendment passed the House May 10, 1866, by a vote of 128 ayes to 37 noes, not one Republican voting against it. It will not be denied, as a matter of history, that this form of amendment received many Republican votes that the first form to which I have referred could not have received. In the Senate there was but little debate on the first section and no change was made in it, except that, on the motion of Mr. Howard, of Michigan, these words were added at the beginning of the section:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the States wherein they reside."

Other changes were made by the Senate in other sections of the amendment, and the whole, as amended, passed June 8, by a vote of 33 to 11.

151A

On the 13th of June the House passed the article, with the Senate amendments, by a vote of 120 to 32, every Republican present voting for it.

With this review of the history of the clause rejected and that adopted in our minds, I ask gentlemen to consider the difference between the two. Putting the fifth clause of the amendment first, and, to make the comparison closer, omitting the definition of citizenship, the section as adopted reads thus:

"The Congress shall have power to enforce, by appropriate legislation, the following provisions"—

To wit:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

And this is the rejected clause:

"The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all the privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property."

The one exerts its force directly upon the States, laying restrictions and limitations upon their power and enabling Congress to enforce these limitations. The other, the rejected proposition, would have brought the power of Congress to bear directly upon the citizens, and contained a clear grant of power to Congress to legislate directly for the protection of

151A life, liberty, and property within the States. The first limited but did not oust the jurisdiction of the State over these subjects. The second gave Congress plenary power to cover the whole subject with its jurisdiction, and, as it seems to me, to the exclusion of the State authorities.

* * *

152A

GUARANTEES OF LIFE, LIBERTY, AND PROPERTY.

The next clause of the section under debate declares:

"Nor shall any State deprive any person of life, liberty, or property, without due process of law."

153A This is copied from the fifth article of amendments, with this difference: as it stood in the fifth article it operated only as a restraint upon Congress, while here it is a direct restraint upon the governments of the States. The addition is very valuable. It realizes the full force and effect of the clause in Magna Charta, from which it was borrowed; and there is now no power in either the State or the national Government to deprive any person of those great fundamental rights on which all true freedom rests, the rights of life, liberty, and property, except by due process of law; that is, by an impartial trial according to the laws of the land. This very provision is in the constitution of every State in the Union; but it was most wise and prudent to place it in the serene firmament of the national Constitution, high above all the storms and tempests that may rage in any State.

EQUAL PROTECTION OF THE LAWS.

153A Mr. Speaker, I come now to consider the last clause of this first section, which is, as I believe, the chief and most valuable addition made to the Constitution in the section. That clause declares that no State shall "deny to any person within its jurisdiction the equal protection of the laws." This thought was never before in the Constitution, either in form or in substance. It was neither expressed in any words in the instrument, nor could it be implied from any provision. It is a broad and comprehensive limitation on the power of the State governments, and, without doubt, Congress is empowered to enforce this limitation by any appropriate legislation. Taken in connection with the other clauses of this section, it restrains the States from making or enforcing laws which are not on their face and in their provisions of equal application to all the citizens of the State. It is not required that the laws of a State shall be perfect. They may be unwise, injudicious, even unjust; but they must be equal in their provisions, like the air of heaven, covering all and resting upon all with equal weight. The laws must not only be equal on their face, but they must be so administered that equal protection under them shall not be denied to any class of citizens, either by the courts or the executive officers of the State.

It may be pushing the meaning of the words beyond their natural limits, but I think the provision that the States shall not "deny the

153A equal protection of the laws" implies that they shall afford equal protection.

Now, Mr. Speaker, to review briefly the ground traveled over: the changes wrought in the Constitution by the last three amendments in regard to the individual rights of citizens are these: that no person within the United States shall be made a slave; that no citizen shall be denied the right of suffrage because of his color or because he was once a slave; that no State, by its legislation or the enforcement thereof, shall abridge the privileges or immunities of citizens of the United States; that no State shall, without due process of law, disturb the life, liberty, or property of any person within its jurisdiction; and finally, that no State shall deny to any person within its jurisdiction the equal protection of the laws.

* * *

153A BILL TO ENFORCE THE FOURTEENTH AMENDMENT.

The first section provides, in substance, that any person who, under color of any State law, ordinance, or custom, shall deprive any person of any rights, privileges, or immunities secured by the Constitution, the offender shall be liable to an action at law, or other proper proceeding, for redress in the several district or circuit courts of the United States. This is a wise and salutary provision, and plainly within the power of Congress.

APRIL 4, 1871

SENATE

SPEECH BY SEN. MORTON
IN SUPPORT OF THE BILL

* * *

252A But it is said these crimes should be punished by the States; that they are already offenses against the laws of the States, and the matter should be left with the States. The answer to that is, that the States do not punish them; the States do not protect the rights of the people; the State courts are powerless to redress these wrongs. The great fact remains that large classes of people, numbering nearly one half in some of the States, are without legal remedy in the courts of the States.

* * *

APRIL 5, 1871

SPEECH BY REP. DAWES
IN SUPPORT OF THE BILL

475 Mr. DAWES. Mr. Speaker, I have from the beginning been an attentive listener to all this debate, unexampled in duration and exhaustive in its character, and I delay for a few minutes the close of this discussion with no vain presumption on my part that I can add at all to the weight of the argument or to the startling array of facts upon which this action

is based, but solely that I may take my full
475 share of the responsibility of this hour, not only as a member of the House called upon to vote on this measure, but as a member of the committee that has reported it; so that no silence of mine may be construed into indifference upon this occasion.

I do not rise, sir, to defend the text of this bill. I recognize in it faults which those who have the right to claim the honor of its authorship are quite as ready and willing as myself to remove by amendments. But I am here, as far as in me lies, to give my support, and some reasons for it, to the principle upon which this bill is founded. The rights, privileges, and immunities of the American citizen, secured to him under the Constitution of the United States, are the subject-matter of this bill. They are not defined in it, and there is no attempt in it to put limitations upon any of them; but whatever they are, however broad or important, however minute or small, however estimated by the American citizen himself, or by his Legislature, they are in this law. The purpose of this bill is, if possible, and if necessary, to render the American citizen more safe in the enjoyment of those rights, privileges, and immunities. No subject for legislation was ever brought before the American Congress so broad and comprehensive, embracing as it does all other considerations hitherto affecting the life, liberty, and pursuit of happiness of every citizen of this Republic. When, sir, by the adoption of the

Constitution in 1788 the American citizen for
475 the first time stood forth before the world, his relations to his Government were so peculiar, the rights which this Constitution had secured to him, the privileges under it which he was to enjoy, and the immunities which it clothed him with were so peculiar, that he stood before the world a wonder and a marvel among all the nations of the earth and all the subjects of other Governments in this world.

Sir, in the progress of constitutional liberty, when, in addition to those privileges and immunities thus secured to him, there were added from time to time, by amendments, others, and these were augmented, amplified, and secured and fortified in the buttresses of the Constitution itself, he hardly comprehended the full scope and measure of the phrase which appears in this bill. Let me read, one by one, these amendments, and ask the House to tell me when and where and by what chosen phrase has man been able to bring before the Congress of the country a broader sweep of legislation than my friend has in the bill here.

* * *

476 **It is all these, Mr. Speaker, which are comprehended in the words "American citizen," and it is to protect and to secure him in these rights, privileges, and immunities this bill is before the House. And the question to be settled is, whether by the Constitution, in which these provisions are inserted, there is also power to**

476 guard, protect, and enforce these rights of the citizens; whether they are more, indeed, than a mere declaration of rights, carrying with it no power of enforcement, giving no authority to the executive, the judicial, or the legislative department of the Government to see to it that the American citizen already enjoyed undisturbed and freely the rights of which it is his just pride to boast before all the subjects of all other nations upon the face of the earth.

Sir, can there be any doubt that there exists whatever power is necessary to secure these rights? I do not stop to define them, I do not stop to say how far they go and what they fall short of. Whatever they are, on this side of the House and on the other no man trifles with them. Every member of this House boasts of them. Every member of this House will stand upon his feet and say that he will do what in him lies to defend them and to secure every American citizen in their full enjoyment, or he will go down before a storm of public indignation wherever he lifts his head. So, sir, we need not stop to inquire what they are. Whatever they are, the question is whether this Constitution, after all, was so empty, consisting of words, nothing more, as merely to embody abstract principles without carrying with it by its own force the power by legislation, or by any other proper means, of securing and carrying out to their full extent the free, undisturbed enjoyment of each and every one of the rights, privileges, and immunities, what-

476 ever they may be and however broad they may be, which the Constitution itself secures, or professes at least to secure, to the American citizen.

* * *

476 So, sir, as well by the reason and nature of the thing as by the authority of the proper interpreters of the Constitution, as by the express authority of the instrument itself, if any one of these rights, privileges, or immunities, whatever they are, are insecure in this or any other time, has been or is likely to be invaded, impaired, or otherwise injured, there is lacking no authority whatever for the pursuit by Congress of the proper means of remedying the evil.

* * *

476 The first remedy proposed by this bill is a resort to the courts of the United States. Is that a proper place in which to find redress for any such wrongs? If there be power to call into the courts of the United States an offender against these rights, privileges, and immunities, and hold him to an account there, either civilly or criminally, for their infringement, I submit to the calm and candid judgment of every member of this House that there is no tribunal so fitted, where equal and exact justice would be more likely to be meted out in temper, in moderation, in severity, if need be, but always according to the law and the fact, as that great tribunal of the Constitution.

476 And, therefore, sir, can we take these offenders into that tribunal. If it be an offense at all, it is because . . is an infraction of the Constitution of the United States or some law thereof; and, sir, for all questions that thus arise no part of the Constitution is more clear of doubt than this, the second section of its third article:

"The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority."

Sir, I have said that if it is an infraction of anything, it is an infraction of the constitutional right that I am discussing; and for the infraction of that right the Constitution is clear; there can be no gainsaying or caviling, that in all cases that arise under this Constitution, and the laws and treaties, the courts of the United States are expressly constituted and clothed with the power and functions they exercise.

Then, sir, where is the ground for debate? I talk of nothing but constitutional guarantees; I do not claim myself to be able to comprehend their full measure and scope. As long as the American citizen shall live under this flag and expanding his pursuits in his honest endeavors, so long his constitutional guarantees will expand and grow with him, and be equal to and cover every lawful enterprise and undertaking of his within the limits of this Republic; and no man can define them upon paper until they come up.

476 Whatever they be, he, sir, who invades, trenches upon, or impairs one iota or tittle of the least of them, to that extent trenches upon the Constitution and laws of the United States, and this Constitution authorizes us to bring him before the courts to answer therefor. That covers, sir, all there is in the first and second sections of this bill.

SPEECH BY REP. WILSON
IN SUPPORT OF THE BILL

* * *

482 By the fifth section of the fourteenth article Congress has power to enforce the provisions of the article by appropriate legislation. Now, I ask, what legislation could be more appropriate than to give to a person injured by another under color of such unconstitutional State laws a remedy by civil action? What provision of the Constitution is violated thereby? It will be sought for in vain. Gentlemen are forced to concede that there are certain rights, privileges, and immunities inhering in the citizen by virtue of the Constitution. These rights, privileges, and immunities Congress may enforce by legislation; and it is proposed to enforce them by this bill, by the mild remedy of a civil action; and that is all there is of it.

Now, sir, what is the second section of this bill? It is simply this. It makes it a penal offense for two or more persons to conspire together to do any act of the character set forth

482 in the section in violation of the rights, privileges, and immunities of any person to which he is entitled under the Constitution and laws of the United States. The Constitution and laws were made to define and protect the rights of citizens. Can it be that Congress has no power to prevent conspiracies against the Constitution or against the laws of its own enacting? Such a proposition will not bear argument since the adoption of the fourteenth article of amendments.

But I apprehend that it is not against these sections of this bill that these objections are more especially aimed, but that the third and fourth sections are more especially obnoxious to gentlemen of the Opposition.

* * *

482 But the language is "no State shall deny." What is meant by the word "State?" Obviously the word is used in its largest and most comprehensive sense. It means the government of the State. What is a State in its true sense? It is a government, not a mere legislative body empowered to enact laws; it is a trinity: the legislative, the judicial, and the executive; these three are one, the State. It requires the combination and coöperation of these three coördinate branches to make the State government; and when the word "State" is used in this article it is in this triune sense, and its constitutional provision means that this trinity shall not deny, &c. Now, if the legislative branch enacts and the judicial and executive fail or refuse to perform their respective

482 parts, does not the State "deny?" If the Legislature provides penalties, and the judiciary refuses to adjudge them or is unable to do so, has not the State denied to the citizen who is the victim of the violation of the legislative act the equal protection of the laws?

A refusal to legislate equally for the protection of all would unquestionably be a denial. This conceded, upon what ground can it be pretended that a refusal to execute, or a failure to do so, through inabilily, equally with reference to all persons, is not also a denial? I maintain, therefore, that the true meaning of this constitutional provision is that the State shall afford equal protection to all persons within its jurisdiction.

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APRIL 6, 1871
SENATE

SPEECH BY SEN. FRELINGHUYSEN
IN SUPPORT OF THE BILL

501 Mr. FRELINGHUYSEN. I will leave my friend from Missouri to discuss that question with the Senators from Rhode Island. It is a little off the line of remark to which I was directing the attention of the Senate.

The General Government should not derogate from the power and authority of the States, but should act in their aid. The Constitution already declares that, when called upon, it is the duty of the President to aid and strengthen the States. But still the perplexing practical question recurs, how, in what manner, is the General Government to protect the privileges of its citizens?

There are three classes of remedies that might be applied: civil remedies, criminal remedies, and public or national relief.

As to the civil remedies, for a violation of these privileges, we know that when the courts of a State violate the provisions of the Constitution or the law of the United States there is now relief afforded by a review in the Federal courts. And since the fourteenth amendment forbids any State from making or enforcing any law abridging these privileges and immunities, as you cannot reach the Legislatures, the injured party should have an original action in our Federal courts, so that by injunction or by the recovery of damages he

501 could have relief against the party who under color of such law is guilty of infringing his rights. As to the civil remedy no one, I think, can object.

* * *

502 The United States thus interfering only when the State will not or cannot protect the privileges and immunities of citizens of the United States, it would be an absurdity to say that when the rights of citizens are willfully violated by the authorities of a State the Federal Government should delay to interfere until requested to do so by the State. The United States interferes only to guaranty rights and protection when the State fails, and acts in its national character, and not municipally. It does not interfere with the State government, excepting to strengthen and sustain it. The United States neither makes nor executes a criminal code. The framework of our Government, reserving municipal government to the States and national jurisdiction to the General Government, is not disturbed. If any one thinks it is going too far to give the United States this national supervisory power to protect the fundamental rights of citizens of the United States, I do not agree with him. It is not wise to permit our devotion to the reserved rights of the States to be carried so far as to deprive the citizen of his privileges and immunities.

502 We must remember that it was State rights, perverted I admit from their true significance, that arrayed themselves against the nation and threatened its existence. We must remember that it was for the very purpose of placing in the General Government a check upon this arrogance of some of the States that the fourteenth amendment was adopted by the people. We must remember that, if the legislation we propose does trench upon what have been, before the fourteenth amendment, considered the rights of the States, it is in behalf and for the protection of immunities and privileges clearly given by the Constitution; and that Federal laws and Federal rights must be protected whether domestic laws or their administration are interfered with or not, because the Constitution and the laws made in pursuance thereof are the supreme law of the land. We are not making a constitution, we are enacting a law, and its virtue can be tested without peril by the experiment. Placing the discretion as to the enforcement of the law with the President, and not with the Governor of a State or with a marshal, I see no peril.

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HOUSE OF REPRESENTATIVES

SPEECH BY REP. BURCHARD
IN SUPPORT OF SECTION 1 OF THE BILL
AND PROPOSING AMENDMENTS TO
SECTION 2

* * *

314A As in the first section of the fourteenth amendment all the prohibitions are upon States, let us inquire

WHAT IS HERE MEANT BY A STATE?

The Constitution recognized existing and future subordinate political governments called States. Every citizen of the United States is a citizen of the State wherein he resides. He sustains relations to the General Government directly as an individual, and indirectly as a citizen of a State. A duty enjoined upon a State evidently can only be performed by and through its people, but a State implies the whole body of the people, organized for political purposes under a government to which powers have been delegated to act for and in the name of the whole. Thus organized, the people compose the State and act, not individually, but in their collective capacity, through agents, either by ordinances through delegated conventions, or through legislative, executive, or judicial officers, acting under a State constitution and laws for the State in the discharge of official duties and functions.

In the enforcement of the observance of duties imposed directly upon the people by the Constitution, the General Government applies

314A the law directly to persons and individual acts. It may punish individuals for interference with its prerogatives and infractions of the rights it is authorized to protect. For the neglect or refusal of a State to perform a constitutional duty, the remedies and power of enforcement given to the General Government are few and restricted. It cannot perform the duty the Constitution enjoins upon the State. If a State fails to appoint presidential electors, or its Legislature to choose Senators, or its people to elect Representatives, Congress cannot act for them. Nor do prohibitions upon States authorize Congress to exercise the forbidden power. It may doubtless require State officers to discharge duties imposed upon them as such officers by the Constitution of the United States. A State office must be assumed with such limitations and burdens, such duties and obligations, as the Constitution of the United States attaches to it. The General Government cannot punish the State, but the officer who violates his official constitutional duty can be punished under Federal law. What more appropriate legislation for enforcing a constitutional prohibition upon a State than to compel State officers to observe it? Its violation by the State can only be consummated through the officers by whom it acts. May it not then equally punish the illegal attempts of private individuals to prevent the performance of official duties in the manner required by the Constitution and laws of the United States?

The Federal courts have repeatedly held that they could require municipal and county offi-

314A cers to perform the duties imposed upon them by State laws in levying taxes, when such tax became necessary to collect a judgment in their courts against such city or county, although all the power and authority of such officers was derived from State laws. It can issue its mandates to such officers and enforce obedience by penalties and imprisonment. Cannot Congress provide to punish conspiracies to prevent the performance of duties it can compel such officers to discharge? Can it not, then, go as far in requiring State or county officers to perform those official duties, or at least those ministerial acts which protect a citizen in the enjoyment of his consitutional rights, as it can in compelling the discharge of those which merely secure the enforcement of a legal obligation? Is the power greater when official duty concerns property than when it concerns life and person? If the Federal Government can compel State officers to act under State laws in the collection of a money bond, can it not insist upon their performance of duties imposed by

315A the Constitution upon State officers by means of which equal protection is secured for life and person? The next clause is:

"Nor shall any State deprive any person of life, liberty, or property, without due process of law."

Is the power to punish individual crimes conferred upon the General Government by this clause? The deprivation must be the action of the State through its officers representing the State. The prohibition was unnecessary as to private persons. No person

315A had or has the right, except in necessary self-defense or under governmental sanction, to deprive another of life, liberty, or property. This limitation is upon the State, as the similar prior limitation in the Constitution was upon the national authority. Neither the national nor the State governments can now deprive a person of life, liberty, or property without due process of law. This clause does not relate to the lawless acts of private individuals depriving persons of life, liberty, or property. Such acts are no more the action of the State than of the United States.

* * *

APRIL 11, 1871

SPEECH BY SEN. EDMUNDS
IN SUPPORT OF THE BILL

* * *

568 Having said this about these amendments, and having stated, I believe, that the committee regard almost all of them as essential to the perfectness and proper and easy operation of the statute, I will now, while I am up, say a word in respect to the scope of the bill as it stands and as it will be, as to its general scope if amended.

The first section is one that I believe nobody objects to, as defining the rights secured by the Constitution of the United States when they are assailed by any State law or under color of any State law, and it is merely car-

568 rying out the principles of the civil rights bill, which have since become a part of the Constitution.

The second section, it will be observed, only provides for the punishment of a conspiracy.

* * *

569 Mr. THURMAN. Will the Senator from Mississippi allow me, before he proceeds, to ask one question of the Senator from Vermont?

Mr. AMES. Certainly.

Mr. EDMUNDS. I will answer any question.

Mr. THURMAN. I am told—I did not hear it myself—that the Senator said nobody was opposed to the first section of the bill, and that was understood here as meaning nobody of the Judiciary Committee.

Mr. EDMUNDS. I did not quite say that. I intended to say, as this was so very simple and really reënacting the Constitution, that I supposed nobody would be opposed to it. I did not undertake to say, because I should have had no right as matter of etiquette or any other right to say, what any member of the committee thought about it.

Mr. THURMAN. I do not complain of that. I do not think there would be any want of propriety in saying that the committee were unanimous in favor of any section of the bill. I do not think there would be any impropriety in so stating if that were the fact.

Mr. EDMUNDS. I did not undertake to say that.

569 Mr. THURMAN. If it was understood in that way, I wish to say that, for reasons which I shall state at the proper time, I am opposed to the first as well as the other sections of the bill.

COLLOQUY AMONG SENATORS
TRUMBULL, CARPENTER, AND EDMUNDS

SEN. TRUMBULL

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577 The difference between the Senator from Wisconsin and myself is, as to what are the privileges and immunities of citizens of the United States. I insist that the privileges and immunities belonging to the citizen of the United States as such are of a national character, and such as the nation is bound to protect, whether the citizen be in foreign lands, or in any of the States of the Union. The Government of the United States protects the citizen of the United States to the same extent in Carolina or Massachusetts as it protects him in Portugal or in England. National citizenship is one thing, and State citizenship another; and before this contitutional amendment was adopted the same obligation, in my judgment, rested upon the Government of the United States to protect citizens of the United States as now.

The next clause of the fourteenth amendment is this:

"Nor shall any State deprive any person of life, liberty, or property, without due process of law."

577 That was the Constitution applicable to the Government of the United States before the adoption of the late amendments. The Federal Government had no authority under the Constitution as it was amended, in 1791 I think, to deprive any person of life, liberty, or property without due process of law. That inhibition did not extend to the States, but all the States had adopted a similar clause in their State constitutions. Every one of them, as far as I have examined, had done so; but there was no clause in the Constitution of the United States binding them to carry out this provision. There is no change in that respect so far as the States are concerned, and the Federal Government cannot interfere with the States so long as they do not deprive some person of life, liberty, or property without due process of law. If they should, then the power is given to the Federal Government to correct that violation of the Constitution of the United States. It may now prevent any State from depriving any person of life, liberty, or property without due process of law. I am not now speaking of the machinery for doing it; but the power is now in the Federal Government under the fourteenth amendment to prevent a State doing what no State would undertake to do without a violation of its own constitution.

Then follows the other clause:

"Nor deny to any person within its jurisdiction the equal protection of the laws."

That is a new provision, and the Federal

577 Government is now vested with power to see to it that no State deprives any person of life, liberty, or property without due process of law, or denies to any person within its jurisdiction the equal protection of the laws; just as, under the old Constitution, no State could pass a law impairing the obligation of contracts. The Federal Government was vested with power to see that no State did pass a law impairing the obligation of contracts. But suppose a State did do it? Suppose a State passed an *ex post facto* law or a law impairing the obligation of contracts? That act was void, and it was the duty of the State courts to pronounce it void, which, in some instances, they did. But suppose the State courts upheld this void act of the State Legislature, which impaired the obligation of contracts; what then? The Federal Government interfered and declared the law invalid and afforded to the party the means to enforce his contract as it had been made.

Now, suppose in the cases arising under the fourteenth amendment that a State attempts to deprive a person of life, liberty, or property without due process of law, or suppose that a State denies to a person within its jurisdiction the equal protection of the laws, then the Federal Government has a right to set aside this action of the State authorities and see to it that the person is protected in his life and his liberty and his property, unless they are taken from him by due process of law, and that he receives the equal protection of the laws, just as it furnished the means to give

577 him the enforcement of his contract under the old Constitution.

Mr. CARPENTER. Will my friend allow me a question at that point?

Mr. TRUMBULL. Certainly.

Mr. CARPENTER. The prohibition in the old Constitution that no State should pass a law impairing the obligation of contracts was a negative prohibition laid upon the State. Congress was not authorized to interfere in case the State violated that provision. It is true that when private rights were affected by such a State law, and that was brought before the judiciary, either of the State or nation, it was the duty of the court to pronounce the act void; but there the matter ended. Under the present Constitution, however, in regard to those rights which are secured by the fourteenth amendment, they are not left as the right of the citizen in regard to laws impairing the obligation of contracts was left, to be disposed of by the courts as the cases should arise between man and man, but Congress is clothed with the affirmative power and jurisdiction to correct the evil.

I think there is one of the fundamental, one of the great, the tremendous revolutions effected in our Government by that article of the Constitution. It gives Congress affirmative power to protect the rights of the citizen, whereas before no such right was given to save the citizen from the violation of any of his rights by State Legislatures, and the only remedy was a judicial one when the case arose.

577 Mr. TRUMBULL. Mr. President, I am not specially upon the question of remedies at this moment, as to how the United States should afford the remedy; but let me say to the Senator from Wisconsin that the authority of the United States was just as positive under the Constitution, as originally framed, as it is under the fourteenth amendment. What says the Constitution of the United States? It says—this is the original Constitution:

"No State shall pass any *ex post facto* law, or law impairing the obligation of contracts."

That is what the Constitution said. What else did it say?

"The Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

578 What was vested in the Government of the United States? The power to carry out the clause declaring that no State should pass a law impairing the obligation of contracts. This was a power conceded by the people to the Government of the United States when they made it, and with that concession went along the power to make all laws necessary and proper to carry it into effect.

Mr. CARPENTER. Will my friend allow me one other remark at that point, which, I think, will end my interruptions?

Mr. TRUMBULL. Certainly.

Mr. CARPENTER. As I now understand his construction of the old Constitution, the

578 authority conferred on Congress to pass laws to execute the powers conferred on the Government included the power to pass laws which should prevent the States from doing the things which they were prohibited from doing by the Constitution. With that admission, I do not think the fourteenth article, or any article, could add anything to the old Constitution. But I never heard of that construction before; and while I am not ready to make an affidavit that it is sound, it is satisfactory for all the purposes of this bill.

Mr. TRUMBULL. Mr. President, as I have once or twice said to the Senator from Wisconsin, I am not upon the remedies. The Government of the United States did provide in 1789, by a law, to give effect to that very clause of the Constitution, and the Senator knows it.

* * *

578 Mr. EDMUNDS. Suppose they fail?

Mr. TRUMBULL. If they fail by reason of organized opposition, resort, as in the case I supposed, and to which the Senator from Vermont agreed, is had to force, if necessary, in order to give the protection.

I come now, Mr. President, to the bill under consideration about which I shall make a few suggestions, and but few. I wish to premise at the outset that I am going into no statement about the outrages in the South. Whether they have been exaggerated, as some contend, or whether they are as bad as others insist, is not a question that I propose at all to discuss.

578 The President of the United States has thought it questionable at any rate whether he had sufficient power to put down organizations which exist in some of the States of the Union, which are encroaching on the rights of person and property, which are committing outrages and sacrificing life. Now, sir, I want it understood that I am ready to go as far as he who goes farthest to maintain the authority of the Government of the United States.

Show me that it is necessary to exercise any power belonging to the Government of the United States in order to maintain its authority and I am ready to put it forth. But, sir, I am not willing to undertake to enter the States for the purpose of punishing individual offenses against their authority committed by one citizen against another. We, in my judgment, have no constitutional authority to do that. When this Government was formed, the general rights of person and property were left to be protected by the States, and there they are left to-day. Whenever the rights that are conferred by the Constitution of the United States on the Federal Government are infringed upon by the States, we should afford a remedy. That was done in 1789 by the twenty-fifth section of the judiciary act, which afforded a remedy against a State statute in violation of the Constitution of the United States, as in the case of a State law impairing the obligation of contracts. I have no objection now to a law which shall protect a person in the same

579 way against inequality of legislation in any of the States of the Union against any law that deprive him of life, liberty, or property except by the judgment of his peers or the law of the land. I am ready to pass appropriate legislation on that subject; and I understand that this bill as it passed the House of Representatives was framed on this principle. As originally introduced, it went to the extent of punishing offenses against the States; and there was objection to it on the part of some of the most thoughtful minds in the House of Representatives. Those provisions were changed, and as the bill passed the House of Representatives, it was understood by the members of that body to go no further than to protect persons in the rights which were guarantied to them by the Constitution and laws of the United States, and it did not undertake to furnish redress for wrongs done by one person upon another in any of the States of the Union in violation of their laws, unless he also violated some law of the United States, nor to punish one person for an ordinary assault and battery committed on another in a State.

To that extent I felt that I could give my support to the bill. I regretted that the Committee on the Judiciary thought it necessary to amend the bill; but a majority came to that conclusion, and I think (although I believe in that the Senator from Vermont who reports the bill with the amendments does not agree with me) that these amendments make the bill obnoxious to the very objection which was made to it in the House of Representatives in its

original shape, that it does go to the extent of undertaking to punish persons for violating State laws, without reference to any violation of the Constitution or laws of the United States.

* * *

APRIL 13, 1871

SPEECH BY SEN. SUMNER
IN SUPPORT OF THE BILL

Mr. SUMNER. Mr. President, the questions presented in this debate have been of fact and of constitutional law. It is insisted on one side that a condition of things exists in certain States affecting life, liberty, property, and the enjoyment of Equal Rights, which can be corrected only by the national arm. On the other side this statement is controverted, and it is argued also that such intervention is inconsistent with the Constitution of the United States. On both questions, whether of fact or law, I cannot hesitate. To my mind, outrages are proved, fearful in character; nor can I doubt the power under the Constitution to apply the remedy.

The evidence is cumulative. Ruffians in paint and in disguise seize the innocent, insult them, rob them, murder them. Communities are kept under this terrible shadow. And this terror falls especially upon those who have stood by the Union in its bloody trial and those others of different color who have just been admitted to the blessings of freedom. To both of these classes is our nation bound

by every obligation of public faith. We cannot see them sacrificed without apostacy. If the power to protect them fails then is the national Constitution a failure.

I do not set forth the evidence, for this has been amply done by others, and to repeat it would be only to occupy time and to darken the hour. The report of the committee at least as regards one State, the testimony of the public press, the stories of violence with which the air is laden and private letters with their painful narrations—all these unite, leaving no doubt as to the harrowing condition of things in certain States, lately in rebellion; not the same in all these States or in all parts of a State, but such as to show in many States the social fabric menaced, disturbed, imperiled in its very foundations, while life, liberty, property, and the enjoyment of equal rights are without that security which is the first condition of civilization. This is the case simply stated. If such things can be without a remedy applied if need be by the national arm, then are we little more than a bundle of sticks, but not a nation. Believing that we are a nation, I cannot doubt the power and the duty of the national Government. Thus on general grounds do I approach the true conclusion.

So long as Slavery endured a State was allowed to play the turtle, and, sheltered within its shell, to escape the application of those master principles which are truly national. The Declaration of Independence with its immortal truths was in abeyance; the Constitution itself was interpreted always in support of Slavery.

651 I never doubted that this interpretation was wrong, not even in the days of Slavery; but it is doubly, triply wrong, now that the Declaration of Independence is at last regarded, and that the Constitution not only makes Slavery impossible but assures the citizen in the enjoyment of Equal Rights. I do not quote these texts, whether of the Declaration or the Constitution. You know them by heart. But they are not vain words. Vital in themselves, they are armed with all needful powers to carry them into execution. As in other days Slavery gave its character to the Constitution, filling it with its own denial of Equal Rights, and compelling the National Government to be its instrument, so now do I insist that Liberty must give its character to the Constitution, filling it with life-giving presence and compelling the National Government to be its instrument. Once the Nation served Slavery and in this service ministered to State Rights; now it must serve Liberty with kindred devotion, even to the denial of State Rights. All this I insist is plain according to rules of interpretation, simple and commanding.

In other days, while the sinister influence prevailed, the States were surrounded by a Chinese wall so broad that horsemen and chariots could travel upon it abreast; but that wall has now been beaten down, and the citizen everywhere is under the protection of the same Equal Laws, not only without distinction of color but also without distinction of State.

What makes us a Nation? Not armies, not fleets, not fortifications, not commerce reaching every shore abroad, not industry filling

651 every vein at home, nor population thronging the highways; none of these make our Nation. The national life of this Republic is found in the principle of Unity and in the Equal Rights of all our people; all of which being national in character are necessarily placed under the great safeguard of the Nation. Let the national unity be assailed, and the nation will spring to its defense. Let the humblest citizen in the remotest village be assailed in the enjoyment of Equal Rights, and the Nation must do for that humblest citizen what it would do for itself. And this is only according to the original promises of the Declaration of Independence, and the more recent promises of the constitutional amendments, the two concurring in the same national principles.

Do you question the binding character of the great Declaration? Then do I invoke the constitutional amendments. But you cannot turn from either, and each establishes beyond question the boundaries of national power, making it coextensive with the national unity and the Equal Rights of all originally declared and subsequently assured. Whatever is announced in the Declaration is essentially national, and so also is all that is assured. The principles of the Declaration, reënforced by the constitutional amendments, cannot be allowed to suffer. Being common to all, they must be under the safeguard of all; nor can any State set up its local system against the universal law. Equality implies universality; and what is universal must be national. If each State is left to determine the protection of Equal Rights, then will protection vary

651 according to the State, and Equal Rights will prevail only according to the accident of local law. There will be as many equalities as States. Therefore, in obedience to reason, as well as solemn mandate, is this power in the Nation.

Nor am I deterred from this conclusion by any cry of centralism, or it may be of imperialism. These are terms borrowed from France, where this abuse has become a tyranny, subjecting the most distant communities even in the details of administration to central control. Mark, if you please, the distinction. But no such tyranny is proposed among us; nor any interference of any kind with matters local in character. The Nation will not enter the State, except for the safe-guard of rights national in character, and then only as the sunshine, with beneficent power, and, like the sunshine, for the equal good of all. As well assail the sun because it is central—because it is imperial. Here is a just centralism; here is a generous imperialism. Shunning with patriotic care that injurious centralism and that fatal imperialism, which have been the Nemesis of France, I hail that other centralism which supplies an equal protection to every citizen, and that other imperialism which makes Equal Rights the supreme law, to be maintained by the national arm in all parts of the land. Centralism! Imperialism! Give me the centralism of Liberty. Give me the imperialism of Equal Rights. And may this national Capitol, where we are now assembled, be the emblem of our Nation.

651 Planted on a hill-top, with portals opening North and South, East and West, with spacious chambers and with arching dome crowned by the image of Liberty; such is our imperial Republic; but in nothing is it so truly imperial as in that beneficent Sovereignty which rises like a dome crowned by the image of Liberty.

Nor am I deterred by any party cry. The Republican party must do its work, which is nothing less than the regeneration of the Nation according to the promises of the Declaration of Independence. To maintain the Republic in its unity, and the people in their rights, such is this trauscendent duty. Nor do I fear any political party which assails these sacred promises, even if it falsely assume the name of Democrat. How powerless their efforts against these immortal principles! For myself I know no better service than that which I now announce. Here have I labored steadfastly from early life, bearing obloquy and enmity, and here again I pledge the energies which remain to me, even if obloquy and enmity survive.

SPEECH BY SEN. OSBORN IN SUPPORT OF THE BILL

653 Mr. OSBORN. I move to amend the sixth section of the bill by striking out all after the word "crime," in the thirteenth line, in the following words:

And the act entitled "An act defining additional causes of challenge and prescribing an additional oath for grand and petit jurors in the United States courts," approved June 17, 1862, be, and the same is hereby, repealed.

653 That the State courts in the several States have been unable to enforce the criminal laws of their respective States or to suppress the disorders existing, and in fact that the preservation of life and property in many sections of the country is beyond the power of the State government, is a sufficient reason why Congress should, so far as they have authority under the Constitution, enact the laws necessary for the protection of citizens of the United States. The question of the constitutional authority for the requisite legislation has been sufficiently discussed.

The question now is, what and where is the remedy? I believe the true remedy lies chiefly in the United States district and circuit courts. If the State courts had proven themselves competent to suppress the local disorders, or to maintain law and order, we should not have been called upon to legislate upon this subject at all. But they have not done so. We are driven by existing facts to provide for the several States in the South what they have been unable fully to provide for themselves; *i. e.*, the full and complete administration of justice in the courts. And the courts with reference to which we legislate must be the United States courts. The report of the committee shows that every man who takes the oath of the order known as the Ku Klux Klan and becomes obedient to its rules is bound to perjure himself to protect the members of the order, no matter how great the crime for which they may be presented to a grand jury or for which they may be upon

653 trial. All the testimony laid before us by the committee bearing upon this point proves conclusively that this is the interpretation given to this oath by those who take it and that this is the practice under it.

The State courts, mainly under the influence of this oath, are utterly powerless then. What shall we do to maintain order and to punish the guilty in a community where a large proportion of the people are bound together by oaths and obligations, having pass-words, signs of recognition, and whose well-defined and clearly-proven object is to gain political control by intimidation and murder, solemnly obligated to clear the guilty or condemn the innocent, according as the one may be a broher in crime and the other a political opponent? What can we do when such men are allowed to crowd each other forward upon juries and upon the witness-stand, with no purpose or object but to swear to truth or falsehood, to condemn or to acquit as may best advance the interests of their order? Justice is mocked, innocence punished, perjury rewarded, and crime defiant in the halls of justice.

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SPEECH BY SEN. VICKERS
IN OPPOSITION TO THE BILL

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661 I understand that this bill is alleged to be predicated upon the principle that the States are unable to protect life, liberty, or property, and being unable, the powers of the General Government are invoked to do it. What evidence have we that a State is unable to fulfill her duties to her citizens? How are we to know that? What is a State? Is it not a body politic and corporate? I give Mr. Webster's definition of a State in the Rhode Island case, which he argued so ably:

"The people cannot act daily as the people. They must establish a government, and invest it with so much of the sovereign power as the case requires; and this sovereign power being delegated and placed in the hands of the government, that government becomes what is popularly called 'The State.' I like the old-fashioned way of stating things as they are, and this is the true idea of a State. It is an organized government, representing the collected will of the people, as far as they see fit to invest that government with power."

That is the definition by a great statesman. It is an organized government representing the collective will of the people. A State can act, how? Only through its departments. A State can act only through its legislative department when laws are involved. How, then, can it be that a State fails to do its duty to its own citizens because it has passed no law? Who is interested in preserving order and tranquillity in a State? Is it not the government of the State? Is it not the people of the State? They have laws to punish all offenses; and there is no want of law, it is admitted, but it is said the States do not execute the laws. Who suffers by that? The citizens of the State, in

661 their persons and their property. Can any other government, for instance the Government of the United States, which is nothing more than a body politic and corporate, say that the State government does not perform its duty to its own citizens, its own people, that it does not protect their property, their persons, their lives, or their interest. How can that be said of a State?

If that could be the case there would be continual conflict between the General and the State Governments. If we once depart from the authority given to the General Government by the Constitution as explained and enforced in the Federalist, then that Government will be in constant conflict with the States. If it can enter a State for one purpose it can for any other purpose. It has no semblance of authority to do it. This fourteenth amendment does not enlarge the powers of the General Government in that respect. It prohibits a State from denying "to any person within its jurisdiction the equal protection of the laws." Has any State done that? Who is to judge whether a State performs its duty to its own citizens? Because, it will be remembered that before the Constitution of the United States was formed they were citizens of the States, they owed their allegiance to the State governments, which had laws to protect them, and officers to execute those laws. When the General Government was formed the States did not surrender any of their police powers, any of those powers to protect the life or the property of their people. They retained them all. The Federalist says that the courts of the States retained all the powers and the jurisdiction which they had before the adoption of the Constitution; and further, when the General Government, by its acts, created new causes or

661 offenses, unless the State courts were prohibited, they would have a right to exercise jurisdiction over those causes; so that the powers of the courts of the States were enlarged, not diminished, by the creation of the Federal Government. The latter does not own a foot of territory in a State unless purchased, and they cannot exercise jurisdiction over purchased property without the consent of the State. The objects of the General Government are external and not internal, and when a provision like this was violated by any State by such denial of the equal rights of the [sic] by State enactment the Supreme Court would have jurisdiction to pronounce such law unconstitutional. Such is the remedy, and not bayonets and suspension of the writ of *habeas corpus*. Congress cannot declare the status which any person shall sustain while in any State of the Union. The power can be exercised over persons as passengers only while on the ocean and until they come under State jurisdiction. It commences when the voyage ends, and then the State laws controls. [sic] (Paschal 105, ref. Tennessee People; 26 Barb. 270.)

Mr. Madison says, in No. 82 of the Federalist:

"I mean not, therefore, to contend that the United States, in the course of legislation upon the objects intrusted to their direction, may not commit the decision of causes arising upon a particular regulation to the Federal courts solely, if such a measure should be deemed expedient; but I hold that the State courts will be divested of no part of their primitive jurisdiction, further than may relate to an appeal; and I am even of opinion that in every case in which they were not expressly excluded by the future acts of the national Legislature, they will, of course, take cognizance of the causes to which those acts may give birth."

661 Now, is it to be presumed by any one that a State does not perform its duty--a sovereign State? Who is to raise the presumption? How is it to be drawn? If a State passes a limitation law, which limits a period for the collection of debts, the State is not bound by its own law, but it binds all the citizens of the State and all who come within its jurisdiction; but it does not affect the claim of the States. *Nullum tempus occurrit regi*--no time affects the king; no time bars the State. It is not bound by its own laws, unless it be named in the statute. No presumption can arise by lapse of time on the claim of a State against an individual that it has been paid, or that the State has been guilty of laches in the prosecution of it. Why? Because it is a sovereign State. It makes rules and regulations, not for itself, unless named, but for those who are subject to its jurisdiction. What have we here? We have the extraordinary attitude assumed by this bill that the State fails in her duty to her people. They presume she fails when the General Government steps in gratuitously and claims the right to act for and in the place of the State in her internal affairs.

I promised to speak but thirty minutes, and I will give way to the Senator from Missouri in a moment.

The fourth section of the bill is:

That whenever in any State, or part of a State, the unlawful combinations named in the preceding section of this act shall be organized and armed, and so numerous and powerful as to be able by violence to either overthrow or set at defiance the constituted authorities of such State, and of the United States within such State, or
662 when the constituted authorities are in complicity with, or shall connive at the unlawful purposes of, such powerful and armed combinations; and whenever, by reason of

662 either or all of the causes aforesaid, the conviction of such offenders and the preservation of the public safety shall become in such districts impracticable, in every such case such combinations shall be deemed a rebellion against the Government of the United States, and during the continuance of such rebellion, and within the limits of the district which shall be so under the sway thereof, such limits to be prescribed by proclamation, it shall be lawful for the President of the United States, when in his judgment the public safety shall require it, to suspend the privileges of the writ of *habeas corpus*, to the end that such rebellion may be overthrown.

Was ever such a thing heard of before? What! That a State, a sovereign State, bound by its constitution and its laws to protect the people of the State, shall absolutely be in com-

662 plicity with the people of its own State, its own citizens, in an infraction of the laws, in a combination to defeat its own laws and to prevent their execution. How absurd and preposterous. Did ever such an idea before enter into the head of any one, that a State could be in complicity with its insubordinate, refractory, and lawless members to defeat its own laws, to disturb its tranquillity, and to promote disorders, violence, and outrage within its own border? The very primary duty of the State is to preserve order and protect its people, and how can such a presumption be raised, and against her, who is to judge of that presumption? Is it Congress? Is it the President of the United States? How is he to get his information? From spies and from informers. How is he to procure it? A State can only act through its organization; it is a body corporate and politic, and can act officially only by its Legislature or Executive.

By the fifth amendment of the Constitution the Federal Government is prevented from depriving a citizen of the United States of life, liberty, or property, without due process of law. This means, of course, process in the courts of the United States, for the provision has no reference to the States or their courts. But how can the General Government deprive the citizen of the rights mentioned? Could it be done by any single department, or by any agent of the Government, or by any number of disguised persons in the District of Columbia? If the President attempted it it would not be the act of the Government. It would

662 require an act of Congress, a law, to justify the allegation that the Federal Government had deprived the citizen of his personal rights and right to property. Could any neglect or omission of the Government raise a presumption against it that it had failed to perform its duty and violated the great fundamental law of the land in this respect, to justify the military interference of others? How unjust and factious is it to lay hold on the conduct of a few disguised men who commit wrong and avoid detection to assume that a State has violated her constitution, and upon that assumption to enter her territory with armed soldiers and the suspension of the *habeas corpus;* assuming further that a state of war exists within her borders, subjecting every one to military trial and punishment. She has passed no law, taken no step toward the privation of any right of the citizen.

The first section of the fourteenth amendment declares that—

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Legislation by the State is expressly referred to, and no State has the power or the capacity to deny the rights referred to, except by legislation; and the meaning is so plain that a subterfuge is scarcely left to the supporters of the bill in the form and shadow of a failure to convict all offenders.

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SPEECH BY SEN. THURMAN
IN OPPOSITION TO THE BILL

216A Mr. THURMAN. This section relates wholly to civil suits. It creates no new cause of action. Its whole effect is to give to the Federal Judiciary that which now does not belong to it—a jurisdiction that may be constitutionally conferred upon it, I grant, but that has never yet been conferred upon it. It authorizes any person who is deprived of any right, privilege, or immunity secured to him by the Constitution of the United States, to bring an action against the wrong-doer in the Federal courts, and that without any limit whatsoever as to the amount in controversy. The deprivation may be of the slightest conceivable character, the damages in the estimation of any sensible man may not be five dollars or even five cents; they may be what lawyers call merely nominal damages; and yet by this section jurisdiction of that civil action is given to the Federal courts instead of its being prosecuted as now in the courts of the States. I am certainly not in favor of denying to any man who is deprived unlawfully of his right, his privilege, or his immunity, under the Constitution of the United States, that redress to which every man is entitled whose rights are violated; but I do think that it is a most impolitic provision, that in effect may transfer the hearing of all such causes into the Federal courts.

My objections to this section are briefly these: I object to it, first, because of the cen-

216A tralizing tendency of transferring all mere private suits, as well as the punishment of offenses, from the State into the Federal courts. I do not say that this section gives to the Federal courts exclusive jurisdiction. I do not suppose that it is so understood. It leaves it, I presume, in the option of the person who imagines himself to be injured to sue in the State court or in the Federal court, an option that he who has been the least injured, but who has some malice to gratify, will be the most likely to avail himself of.

In the next place, I object to it because it is really, whatever may be said about it, a disparagement of the State courts. This bill embraces the whole United States; and to say that every man who may be injured, however slightly, in his rights, privileges, or immunities as a citizen of the United States can go to the Federal courts for redress is to say, in effect, that the judiciary of the States is not worthy of being trusted. I for one am unwilling to say that. I certainly am unwilling to say it in regard to my own State. Although the judges of the highest court in Ohio are all politically opposed to me, and although a large majority of the judges of the inferior courts are in the same manner opposed to me in political sentiment, I stand here this day to affirm that they will give fair and impartial redress to any man whose rights under the Constitution have been violated by any one whomsoever. I am unwilling to say to the people of Ohio that the Congress of the United States thinks their judiciary

216A so unsafe or so unworthy of trust that the people must seek for redress in the courts of the United States.

In the next place, I am opposed to this transfer of jurisdiction to the Federal courts because of the expense and the inconvenience that must attend it. In most of the States the Federal courts are held in not more than two places; there are very few in which they are held in as many as three places. Let an action be brought, therefore, in the Federal court, it may be but for five dollars, and the defendant may be dragged hundreds of miles, at great expense, to attend to the defense of the suit, and not he only, but also the witnesses who may be necessary to make out his defense.

For these reasons it does seem to me that this grant of jurisdiction to the Federal courts to entertain these actions, without any limit whatsoever as to the amount in controversy, is impolitic and unwise.

My next objection to the section is its vagueness; and now I pray the attention of the Senate to that. It provides—

That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in an action at law.

"Any person" who is deprived "of any rights, privileges, or immunities secured by the Constitution of the United States." What

216A is meant by that? What are the rights, privileges, and immunities that, in the opinion of your committee, are secured by the Constitution of the United States? I take it that if that is to be left to judicial decisions, as it is here entirely, without any definition on our part, there may be almost as many decisions as there are judges of the Federal courts; and it will be a long time before the questions that would arise under this section would reach the Supreme Court of the United States and there be definitely settled.

Are Senators on this floor all of the same mind as to what are the rights, privileges, and immunities of citizens or of persons secured by the Constitution of the United States? What is the opinion of the elder Senator from Massachusetts [Mr. SUMNER] as shown by his supplementary civil rights bill, which he has pressed with so much earnestness upon the attention of the Senate? If I understand the scope of that bill, he holds it to be one of the rights, privileges, and immunities of a citizen of the United States that, without regard to color, he shall occupy in the hotels, in the public theaters, in the concert-rooms, in the churches, and in the schools of the country the most absolute

217A social equality with everybody else; and, therefore, if any school directors should provide schools for the colored children separate from the whites and not allow them to mix together, that would be, in his opinion, a deprivation of the right of the colored child. If any hotelkeeper should set apart a particular table for

217A the colored people who should be his guests, instead of allowing them to sit at the table frequented by the whites, that, in the opinion of the Senator, would be an indignity offered to them, a violation of the rights, privileges, and immunities. If they are not allowed to mix with the guests of the Arlington at the first table of that hotel, or if they are not allowed to take their seats indiscriminately with the whites at the Academy of Music or the Opera House in New York, that, as he thinks, is a deprivation of their rights, privileges, and immunities as citizens of the United States.

If he is right in all this—and there are other Senators here who concur with him—then every hotel-keeper, every steamboat man, every keeper of a place of public amusement, every school director, may be liable under this bill because he does not give to the colored people the absolute social equality of mixing indiscriminately with the whites at places of public amusement, or in the hotels, or on the steamboats, or in the schools. Every railroad company, if it sets apart a particular car for colored people, though it may be as good a car as any in the train, is, upon this interpretation of the Constitution, liable to an action in the Federal courts under this bill, should it become a law.

Now, it does seem to me that in view of these illustrations—and they are but a few out of many that might be given—in view of the great question, what are the rights, privileges, and immunities secured by the Constitution of the United States? when we undertake to con-

217A fer such a jurisdiction as this on the Federal courts we ought to define what rights, what privileges, what immunities, in our opinion, are thus secured and call for protection in those courts.

But again, I have another objection to this section. Have Senators noticed how comprehensive its language is? It refers to a deprivation under color of law, either statute law or "custom or usage" which has become common law. It provides—

That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, &c., shall be liable to an action.

Now, I put it to the member of the committee who has this bill in charge, does that include the legislators of a State? And when he comes to address the Senate I hope he will tell us what his interpretation is. It is a deprivation under color of law, a deprivation which some one shall inflict or cause to be inflicted upon some other; and now if the legislators of a State pass a law which, in the judgment of some person, deprives him of some right, privilege, or immunity, and a district judge of the United States should be of the same opinion, I put it to the Senator, where is the clause that exempts those legislators from the action that is provided in this section of the bill? I do not know what answer can be given to this. They pass the law, and they are therefore the very persons who do cause the man

217A to be deprived of what is held to be his privilege.

Suppose, for instance, the State of Ohio, as has usually been the case there, provides for schools for white children separate from schools for colored children; for the State of Ohio has educated colored children almost ever since it had a school system, but in general has provided for their schools being kept separate from the schools for the white children. If that is the deprivation of a right, privilege, or immunity, then by the terms of this bill, unlimited as they are, every legislator who votes for such a law is liable to be sued in a district court of the United States, and that although he voted for the law under the obligations of his oath to support the Constitution of the United States, and in strict accordance with what he conscientiously believed to be the true meaning of that instrument.

Let us go a little further. Let us apply it to ourselves. There is no law in this country that exempts members of Congress from responsibility any more than members of State Legislatures. The Constitution provides that we shall not be liable to answer anywhere else for what we may say in debate upon this floor, but for our acts we are just as liable as members of State Legislatures, for they have the same exemption. Suppose a majority of Congress shall pass a bill which in the judgment of some district judge of the United States shall have the effect to deprive an individual of some right, privilege, or immunity secured to him by the Constitution of the United States.

217A It may be said that that does not apply, because the law that is here spoken of is the law of a State, but in principle it would apply, and if a legislator of a State ought to be sued because he voted for a law which he conscientiously under his oath believed to be constitutional, you should carry out the principle and subject a Senator in Congress to exactly the same liability. Need I say that such a liability would be utterly destructive of the freedom of thought and action that are indispensable to the proper discharge of legislative duties?

But let us go a little further. What is to be the case of a judge? The Legislature of a State passes a law. It goes before a judge of the State court for interpretation. Under the oath which he has taken to support the Constitution of the United States and the constitution of his State he conscientiously renders a decision which another man, a judge of the district court of the United States, may suppose deprives some person of a right, privilege, or immunity secured by the Constitution of the United States. Is that State judge to be taken from his bench? Is he to be liable in an action? Is the old maxim of the law, that a judge for any judgment he gives can only be liable to impeachment, to be reversed and that judge dragged into a Federal court to be mulcted in damages if the Federal judge, no wiser than he, under no higher obligation to obey the Constitution than he, shall be of a different opinion?

217A Let it not be supposed that this is a fanciful case. There have been two or three instances already under the civil rights bill of State judges being taken into the United States district court, sometimes upon indictment for the offense, forsooth, of honestly and conscientiously deciding the law to be as they understood it to be. There is a judge now in the State of Virginia, if I am not misinformed, who is under recognizance to appear in a Federal court to answer for the monstrous crime of having rendered a decision which the district attorney of the United States says is erroneous. There is a criminal indictment against him. And I believe the same thing has occurred in the State of Kentucky.

Is it intended to perpetuate that? Is it intended to enlarge it? Is it intended to extend it so that no longer a judge sitting on the bench to decide causes can decide them free from any fear except that of impeachment, which never lies in the absence of corrupt motive? Is that to be extended, so that every judge of a State may be liable to be dragged before some Federal judge to vindicate his opinion and to be mulcted in damages if that Federal judge shall think the opinion was erroneous? That is the language of this bill. Whether it is the intent or not I know not, but it is the language of the bill; for there is no limitation whatsoever upon the terms that are employed, and they are as comprehensive as can be used. These are my objections to the first section.

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SPEECH BY SEN. BOREMAN
IN SUPPORT OF THE BILL

* * *

229A If then these people in the southern States are entitled to the privileges and immunities of citizenship as they are defined by the courts of the country, is there a remedy under the Constitution? The preamble to the Constitution, which is declared by Judge Story, and I believe by Chief Justice Marshall, to be the key to this instrument, gives us to understand for what purposes it was ordained and established. The people of this country established this Constitution for certain purposes. In their language—

"We, the people of the United States, in order to form a more perfect Union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and posterity, do ordain and establish this Constitution for the United States of America."

They ordained and established this Constitution for these purposes. While the establishment of justice therein referred to and the domestic tranquillity therein referred to may be said by the lawyers not to be applicable to this particular matter, yet it does seem to me that the latter part of the preamble, which declares that the purpose is "to secure the blessings of liberty to ourselves and our posterity," must enter into the subject and be taken into consideration when we come to construe the provisions of the Constitution. The Consti-

229A tution also declares that Congress shall have power—

"To make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

Now, sir, I apprehend—I do not know what other gentlemen think on the subject—that this provision of the Constitution is to stand in the same relation to the fourteenth amendment that it does to the Constitution as originally made, and that this guarantee of power in the Congress of the United States is as applicable to the fourteenth amendment as to any other portion of the Constitution. But whether that be so or not, we find that, in adopting the fourteenth article of amendment, care was taken to avoid the difficulties which had hitherto been thrown in the way of a fair construction of this great instrument by the gentlemen who were called the "strict constructionists" of this country; and the people of the United States in adopting the amendment declared:

"The Congress shall have power to enforce by appropriate legislation the provisions of this article."

Then, sir, you have a declaration in the Constitution as it was originally adopted of the power in Congress; you have a declaration of the power expressly given in the fourteenth amendment for the enforcement of its provisions. But, sir, if these provisions did not exist without which Congress would have the power, properly speaking, to enforce the rights of these people who are being outraged at the

229A South, let us see what the authorities have said on this subject. Having settled the question as to what these rights are that are guarantied to the citizens, let us come to what the authorities say as to the remedy to which a party is entitled. In the forty-third number of the Federalist Mr. Madison said: "A right implies a remedy." In the forty-fourth number of the Federalist it is declared, and that is in discussing one of the provisions of the Constitution to which I have referred, that "no axiom is more clearly established, in law or in reason, than that whenever the end is required the means are authorized."

* * *

229A Thus, Mr. President, it seems to me that not only from the plain reading of the Constitution itself with the addition of the fourteenth amendment, but upon the authorities and the decisions of the courts to which I have referred, there can be no question about the power of Congress. Would it not be the merest mockery to say that the citizens of any portion of this country, or the people residing in any portion of this country, had guarantied to them by our Constitution certain rights, and at the same time to say that there was no power in this Government to secure to them those rights, to carry out the guarantee, to enable them to enforce those rights? While a power of this sort may lie dormant sometimes, and we may find that one who has been injured and who

229A has been damaged cannot find on the statute-book a remedy provided, yet the power is there, and it only requires the action of the legislative branch of the Government to bring it into being, to provide the machinery in order that the injured person may secure his rights.

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APRIL 14, 1871

COLLOQUY BETWEEN
SENATORS EDMUNDS AND THURMAN

696 Mr. EDMUNDS. My friend knows that when he goes to an argument or threatens one I am always convinced at once. [Laughter.] But the chief point now is, as my friend agrees, that here is, whether necessary or unnecessary, an express grant of power to us, the national Legislature, to defend the rights of citizens of the United States and all inhabitants of the country, whether citizens or not, against slavery. Now, how are you going to do it? Are you going to do it by passing a proclamation to the State of Georgia when she may choose to reënslave her negroes? Or, are you going to do it by making war upon her? Or, are you going to do it, as we by this bill do it under the fourteenth amendment, by declaring that any man who infracts that article shall be punished?

I take it, there is only one answer to that question. If any State should undertake to set up slavery, or any man in a State should

696 undertake to set it up, (because the old theory was that the States did not set it up at all, that it was a kind of hereditary personal right that came down from the patriarchs in some undefined way,) my friend from Ohio would be among the most earnest opponents of any legislation which should address itself to the State of Georgia. He would say, "The State of Georgia is not in fault; she cannot as a State be in fault at all, because her officers, her Legislature, her Governor, her judiciary, all together as such, have no power or authority to do anything of the kind, and their acts, therefore, are utterly void, and the people in their collective capacity are not responsible for them at all; and you have no right to make war upon the people because their officers, their mere agents whom they have selected, have exceeded their jurisdiction and authority. Go," he would say, "to the guilty ones. Address yourselves to the criminal who has violated this article of the Constitution and the statutes of the United States by doing that which the Constitution forbids."

Thus you will have enforced the thirteenth article of amendments and secured liberty and punished slavery. It would be an extreme case which could justify any other answer; and inasmuch as slavery is so odious to mankind now, gentlemen of all political shades would acquiesce, and there would not be a debate or a party division upon the passage of a bill which should provide for the punishment of the act of reducing any man to slavery, under the thirteenth amendment. Nobody, I

696 venture to say, would have been heard to open his lips to condemn such legislation, however much some portion of the people might desire to see slavery restored, or to question the propriety or the constitutionality of enacting it.

But when you take the next step and come to the next article of the Constitution, which secures the rights of white men as much as of colored men, you touch a tender spot in the party of our friends on the other side. If you wish to employ the powers of the Constitution to preserve the lives and liberties of white people against attacks by white people, against rapine and murder and assassination and conspiracy, contrived in order to drive them from the States in which they have been born or have chosen to settle, contrived in order to deprive them of the liberty of having a political opinion, contrived for the purpose of driving them from a city or town where they have endeavored to carry on a peaceable and lawful business or to cultivate the soil, then the whole strength of the Democratic party and all its allies is arrayed against the constitutionality and propriety of such an act.

Sir, what did the fourteenth amendment say, taking it a little in detail? The first section of it is all that I need to read. It has four distinct and separate clauses. The first is the one upon which I have commented, and I will now only state it:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside."

696 I have said prematurely, in answer to my friend from Illinois, and out of the order of the proper discussion of this subject, all that I will take the time to say about it. The next is the provision that:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

There is a direct prohibition to the State; it is a direct prohibition against the making of a law; it is a direct prohibition against the enforcing of a law; and that perhaps brings me to the question here as well as anywhere else, what is a State?

My honorable friend from Ohio [Mr. THURMAN] said yesterday, my friend from New Jersey [Mr. STOCKTON] said the other day, and everybody says on that side, that a State is the legislative department, and that all the prohibitions and commands of this section are addressed to the law-making power of a State, and that any omission of the Governor to give rights under his department, any omission of the judiciary to grant rights under their department, any violation by either of these departments of a State government of any right secured by this section, is not a violation by the State, for that must be by the law-making power. Now, apply it to this:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

Not "abridge the privileges and immunities of citizens of one State going to another," as the old language was, but "which shall

696 abridge the privileges and immunities of citizens of the United States," whether they are citizens of one State or another—absolute and complete. But what is the State? Is it the Legislature? It is as to making law, with the aid of a Governor. As to enforcing a law, is the Legislature the State? How do Legislatures enforce laws? I had been taught in my little reading and experience in the profession of the law that the enforcement of the law belonged to the judiciary and the executive combined. I had never heard before that it was a part of the legislative functions of a government to enforce laws; and yet, if my friend is right, although the very word "enforce" is used in this prohibition, it is after all only a command to the members of the Legislature that they shall not enforce any such law; and therefore the executive and the judicial departments of the State are not prohibited from enforcing any law they please which violates the privileges and immunities of citizens of the United States.

Why, Mr. President, this is absurd; it flies in the face of the very language, it flies in the face of everything we know of the nature and constitution of a government, be it State or national.

Mr. THURMAN. Will the Senator allow me to interrupt him at this point?

Mr. EDMUNDS. With the greatest pleasure.

Mr. THURMAN. I do so because the Senator has attributed to me quite a mistake.

Mr. EDMUNDS. I thought it was quite a mistake.

696 Mr. THURMAN. Either the Senator did not understand me, or I do not understand him. The language is, "no State shall make or enforce any law which shall abridge the privileges and immunities of citizens." He will admit at once that it is only the legislative power in a State which can make a law. He will also admit at once that the courts and the executive power of the State do not enforce laws that are not made by the State, or not recognized as law by the State, being the common law of the State. Therefore, when it is said there that "no State shall make or enforce any law," it can only apply to laws which are made by the Legislature of the State, or to the common law of the State.

Mr. EDMUNDS. I do not see that that changes it. That is exactly what I said. Of course, if the Legislature do not make a law which abridges the privileges or immunities of citizens, then there is no such law that the other departments of the State government can enforce But suppose the Legislature does make a law which abridges the privileges of a citizen, and suppose that the judicial and executive departments of the State government undertake to put it in force; what then? According to his argument you can only punish the Legislature; you can make war upon them or you can indict them, or do whatever our friends on the other side think would be adequate to the end; and I should like any one of them to be kind enough to point out what he would do in such a case. What, then, was the use of putting in this prohibition against

696 enforcement? None at all in that case. I repeat, with all respect to my friend, that an argument of that kind borders, if he will pardon me for saying so, upon absurdity.

The enforcement of laws, as I have said, does not belong to the legislative department at all; it belongs to the other departments; and as to the enforcement of law, the other departments are the government; they are the whole government. Why, sir, what a position we should be in if this honorable Senator's position were sound! Look at our case with England during the rebellion. There were the acts of Parliament which denounced punishment against the fitting out of expeditions against friendly Powers; there was the executive department, the Crown, armed with all its constables and sheriffs and its military power; there was the judiciary in the full exercise of its functions. Through the fault of the Executive and through the fault of the judiciary expeditions were fitted out; they did make war upon our commerce; they did violate our rights. "Now," says my friend, "the Crown and the judiciary of England are not the Government; they are to blame, but they are not the State; the duty of executing the statutes of England does not belong to them, or if it did, they are not responsible for not doing it; the power of England is in the Parliament; and inasmuch as Parliament had done all that was necessary for it to do before, as the statutes were there, England is not responsible at all." That doctrine cannot be maintained. A State is a corporation; it exists only, in contempla-

696 tion of law, as an organized thing; and it is manifested, represented entirely, and fully in respect to every one of its functions, by that department of its government on which the execution of those functions is respectively devolved. Therefore, if it is the duty of the executive and judicial departments of a State to enforce a law and they do not enforce it, the State does not enforce it. If it is their duty not to enforce a law and they do enforce it, it is the State that enforces it.

* * *

697 Therefore, I take it, Mr. President, that I need not occupy much time in saying that whatever this provision of the fourteenth article guarantees to a citizen, that the citizen is entitled to have; and if he is entitled to have it, how is he to have it? The section answers, he is to have it in the language of the Constitution, which is the voice of the people, through the legislation of this body. The people have declared that he shall have this protection. The people have declared that the State authorities shall not deny it to him. The people have declared that it is the solemn duty of Congress to see that he has it because they have decreed that "Congress shall have power to enforce the provisions" of this section of this clause "of this article by appropriate legislation." Therefore the Constitution contemplated that whenever an occasion should arise where it was necessary to protect these rights Congress should protect them.

697 It is impossible to resist the conclusion. Suppose this did change the Government, as my friend from Illinois appears to fear, do you not rather think, Mr. President, that it is a good change? If the Constitution did not before, holding a sovereignty over its citizens, have the faculty of, through its legislative branch, protecting those citizens in the rights that the Constitution gave them, the rights which a common human nature gives them, against any assault by any State or under any State or through the neglect of any State, then it was high time, for the honor of the American name and for the rights of humanity, that the institutions of this country should change.

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APRIL 18, 1871

EXPLANATION BY REP. SHELLABARGER TO THE HOUSE OF THE 1ST CONFERENCE COMMITTEE REPORT (REGARDING MODIFIED SHERMAN AMENDMENT)

* * *

751 This, I believe, is the last matter of difference between the two Houses except that relating to what is known as the "Sherman amendment." I have not the means of referring the House to the exact words of that amendment as agreed to by the committee of conference except as they are contained in our report, which, however, is, I understand, printed in the Senate proceedings as published in this morning's Globe.

751 I will now state, Mr. Speaker, accurately if I can, what the effect of this section will be as agreed to by the committee. First, it does make a liability for a class of damages or injuries which result from riotous disorders. It must be kept in mind no other damages except damages produced by riot are within the section. In all these other damages in the second section by conspiracy or anything of that kind which do not amount to riot—and that has its well-known legal significance, and means two or more persons tumultuously assembled and doing unlawful acts and doing them in an unlawful way, by force and violence—if it comes short of that offense committed tumultuously in the face of the community, then it is not within the section at all. Nothing is in it but such disorder as that.

Next, the amendment agreed to by the committee of conference completely changes the remedy granted for the mischief, by preventing a claimant entitled to recover from resorting to property of individuals at all and confining his right of recovery to the county or city in which the mischief was done. If done in a city, then the action must be against the city. If in a county and outside of a city, the action must be against the county; and of course the people of a city as tax-payers in the county being to that extent liable. Then, as to the method of enforcement of the judgment when recovered, it provides they shall have the remedies applicable in cases of judgments against corporations of this municipal character. It does no more. It provides for

751 enforcing judgments by *mandamus* or by any other appropriate remedy applicable in like cases. It goes to that extent exactly, that such judgments may be enforced in the known and usual methods of the law.

It does more. It permits the parties who did the mischief to be united as defendants along with the municipality sued. It does still more; it requires the municipality shall not be made liable to pay that judgment until there is execution returned showing the money cannot be made out of the individual defendants. It requires two months to elapse before judgment can go against the municipality. It requires at first the exhaustion of the means of collecting the liabilities from the individuals doing the mischief. It puts the city or county in the position of guarantor, provided any other parties are sued. The county or city being interested in having such defendants can move to have any party made defendant to a suit for its own protection. Thus we have guarded, as well as it could be done, the county or city by appropriate proceedings.

The Senate I need not say was exceedingly earnest and positive in insisting there should be something of the character retained in the bill, and it was impracticable to procure the yielding of the Senate from that in some shape.

Now, then, Mr. Speaker, this is the report.

The question now of duty is of course before the House. It is entirely too late to enter on a discussion of a question so intricate in some of its aspects as well as so new in some of its

751 aspects as the question made in regard to the right to pass this Sherman amendment as we call it. I have chosen to put down in writing some statements in behalf of myself, at least, as a member of the committee in vindication of the right of the Government of the United States through its Congress to do the thing provided for in this section, and with the indulgence of the House I will read what I have written in order that I may be short.

* * *

751 Three propositions are by these principles thoroughly established:

First. That the Government's duty to the citizen includes protecting against a mob the property of such citizen.

Second. That it is strictly within the scope of the legislative power of any Government, whose duty it is to protect a given privilege of a citizen against a mob's invasion of such privilege, to assess the damages of such invasion upon a prescribed subdivision of that government which owes such duty to protect.

Third. That so to assess the damages against such local division of the government is neither a taking of private property for public use, under the power of eminent domain, nor is it a violation of the Magna Charta, nor of the Bill of Rights, protecting property from being taken except "by due process of law." Even the dissenting opinion of Ingraham in Darlington *vs.* New York, (31 New York Reports, 206,) so expressly admits, for it says:

"That a law is valid making the county in which property shall be destroyed or injured by a mob or

751 riot liable to the party injured I have no doubt."

If, therefore, this law is unconstitutional, it is not because it takes the property of peo-

ple who did not do the wrong to pay for the destruction of property by a mob, nor is it because it violates the right to "due process of law," nor is it because it is outside of the functions of a government which owes the protection of that particular right which the mob invaded. If this amendment is not invalid for these reasons, then what are the reasons which make it unconstitutional? There can be but three, to wit: either, first, that the right which this amendment seeks to protect is not one which the Government of the United States has jurisdiction to protect; or second, if it has the power to protect it, then that this section is not in its nature "appropriate" as that word "appropriate" is used in the Constitution; or third, if it be both within the class of things which Congress may protect, and this method is "adopted" to protect it, then that it is incompetent for the United States to inflict liabilities and resulting taxes upon a municipal corporation or an integral part or creature of a State.

But this amendment confines itself in express words to protection of a right conferred under the Constitution and laws of the United States; and to say we can pass no law to protect a right given by our own statutes and Constitution is not only to deny the power to pass this bill in any part of it, is not only to deny the United States the right to enforce its own

751 laws, but is to literally and self-evidently strip the United States of every attribute of government—is to place it precisely where the doctrine of secession and Buchanan's message placed it, with a Constitution but no power to enforce it, with laws but no right to execute them, with citizens but no attribute to defend them! I did suppose the war had by its frightful lessons taught us all that this Government, like all others, was a nation.

Then the first objection to this amendment, that to protect a right held under United States laws is not constitutional, cannot be maintained.

The next, that making communities or divisions of a State liable for riots which they tolerate is "appropriate" as a means of stopping them, is proved by the experience of at least six hundred years in most of the enlightened Governments of the world.

Really, therefore, the only question left is the third, to wit: whether, since a county is an integer or part of a State, the United States can impose upon it, as such, any obligations to keep the peace in obedience to United States laws. It is, in its legal significance, the same question we have heard before in these and other Halls, "Can the United States coerce a State?" To-day it is, "Can the United States coerce a county of a State, touching a subject-matter over which the United States has power to coerce every person in that county, to wit: touching there being or not being mobs in such county, kept up and perpetuated to defy the laws of the United States and destroy the rights

751 secured by these laws?" Those who deny this power of the United States to touch a county, as such, rest their denial on various grounds. One is that the United States would, by this amendment, be imposing a direct tax on the county to pay this judgment, and that this is prohibited. There are many reasons why this is not a sound objection. I shall state but one, to wit: that in so far as the enforcement of payment of judgments in the United States courts against counties or other municipal corporations may involve or require the assessment of taxes upon the people of such counties, it is completely established that such assessment of taxes can be compelled by the laws and courts of the United States in favor of a private suitor in United States courts. For these cases, where the Supreme Court of the United States holds that such taxes may be ordered by mandamus from United States courts, see Knox County *vs.* Aspenwall, (24 Howard, 384, &c.)

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EXPLANATION BY SEN. EDMUNDS
TO THE SENATE OF THE 1ST CONFERENCE
COMMITTEE REPORT
(REGARDING MODIFIED SHERMAN AMENDMENT)

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756 It is said that the United States cannot proceed against a municipality, either a county, town, or city, because they are the creation of State law; and therefore we cannot act upon them in their organized capacity at all. I will merely say in reply to that, what seems to me to be a perfectly conclusive answer, aside from answers that would exist at common law, that the Constitution declares that it shall be the duty of the State to give to everybody the equal and complete protection of its laws; and where, therefore, there is a State organism, as a county, which is intrusted with the local administration of justice, which is intrusted with the local preservation of peace, as every city, county, and parish in the country is in our autonomy and in every other civilized autonomy, then this clause in the Constitution which speaks of the protection which the States must afford to all their inhabitants equally under the law, to preserve them against riots and tumults, does speak, as was argued the other day—and I do not now intend to repeat it, but merely to explain the ground upon which this proceeds—to the municipal authorities existing under the State law directly; and when, therefore, they fail to perform the duty of protection, which the theory of this law implies that they are bound to perform, against tumult and

756 riot, then the Constitution has declared that Congress, by appropriate legislation, may apply to them the duty of making reimbursement. But I do not wish to go into an argument upon any principle we have discussed before. I merely say that in explaining the ground upon which it was made clear in my mind.

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757 The ground upon which this rests is entirely separate from that. If it were not, I should see no constitutional objection to it. But it is quite a different thing; it is, given the legislative and constitutional responsibility growing out of the structure of the Government under these amendments and the duty of the authorities of the localities to protect people in the way and to the extent that the Constitution says they shall protect them, then it must follow that he who refuses that protection or denies it, be he a principality or a city, or a nation, if you please, is bound, if there is any value in the law at all, to make good the injury which the citizen who is entitled to that protection suffers; in other words, to bear the consequences of his own default. There is nothing in a violation of law, there is nothing in a default of the performance of public duty, unless it is to be followed by punishment or recompense, or both. That is all there is to it.

If here is a right and a duty which stops there, and which cannot be followed by any power that shall compel the protection of that right, or the performance of that duty, then

757 the Constitution and the law in all cases is sheer waste paper and government is at an end. No, sir; that cannot be so. Wherever there is a right to this protection; wherever there is a duty on the part of a State, or any of its organisms, to give this protection, and it fails, as in the case under this section of a tumult and riot, which it was the duty of the county or municipality to have guarded against and put down and have repressed, then it must follow as an incident to that, and as suitable and proper to that, in the judgment of Congress, depending upon its judgment and wisdom, that it may properly, in a constitutional sense, (and its wisdom I do not stop to argue at all, because it is so just that I think it will commend itself to everybody,) it must follow that Congress may provide that the particular municipality charged with the duty of preventing such riots and tumults shall make good to the sufferer in some way the consequence of its default, which has produced the suffering to him.

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SPEECH BY SEN. MORTON
IN SUPPORT OF THE 1ST CONFERENCE
COMMITTEE REPORT

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774 Again, we were told four years ago, and that has been repeated constantly since, that there was no constitutional power to pass the reconstruction laws, that there was no constitutional power to impose any limitations or conditions to the return to the enjoyment of political

774 rights of those who had been engaged in the rebellion; that they had the right to return to the full enjoyment of civil and political power without any conditions or limitations being imposed upon them by Congress, that there was no power to impose such conditions.

Mr. EDMUNDS. And Johnson issued his proclamation on that basis.

Mr. MORTON. Yes, sir. Then it was said last session when we passed the bill for the purpose of preserving the purity of the ballot-box in the election of members of Congress that we had no right to do that; the Constitution was torn and almost ruined by the passage of that act. And now we are told that we have no power to pass a bill for the protection of life and property and liberty in the southern States; that the recent constitutional amendments absolutely amount to nothing so far as giving to Congress any power for their enforcement is concerned. And so it goes; the history of the Democratic party for the last eighteen years at least has been one of denial; I do not mean by that self-denial, but it has been one of denial and negation.

For these reasons I am not alarmed by the declarations which have been made during this debate by distinguished Senators that this bill was a violation of the Constitution in every part; that it destroyed the existence of States; that it was a great and wicked usurpation of power. I think that the Constitution gives us the power to pass this bill, and that the condition of things in the southern States makes it our imperative duty to do so.

SPEECH BY SEN. FRELINGHUYSEN IN OPPOSITION TO MODIFIED SHERMAN AMENDMENT

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777 But I doubt the constitutionality of the amendment. This General Government, as I understand it, deals with States and with citizens. It does not know such things as towns, parishes, and counties. They are the integral parts of States; they are entirely under the government of the States as political corporations, and the Constitution of the United States recognizes no relation between the Federal Government and these subordinate political corporations.

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777 Therefore I do not see that the fourteenth amendment has changed the case in the least. We deal with States; we deal with the citizens; but I do not see in that amendment anything which authorizes the Congress of the United States to regulate the police regulations of the cities and counties of New York and New Jersey. We must remember that we are legislating for this whole nation, that we are legislating for all time, and we must touch with care the framework of our Government. Therefore I hope to see this provision of the bill, which was not reported by the committee, which met with its disapprobation, taken from the bill.

APRIL 19, 1871

SPEECHES IN OPPOSITION TO MODIFIED SHERMAN AMENDMENT

REP. WILLARD

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791 Now, let me come to the amendment which for convenience has been called the Sherman amendment, the essential amendment put upon the bill in the Senate. I am not prepared to, and I shall not here enter upon any discussion of the constitutional power of Congress to resort to legislation of this character. But it seems very clear to me that if there is in the Constitution any power vested in Congress to resort to a provision like this for the punishment of offenses, or for giving redress to persons injured, this is very clearly an unwise and improper exercise of that power. So far as I know, the exercise of such a power by any Government is only warranted when the community upon which the penalty is visited, as by this section, has proved faithless to its duties, when it has not performed the obligations that rest upon it, and which it was abundantly able to perform, if it had the disposition to do so.

So under the old law of England if the hundred performed all that they were required to perform as good citizens they were no longer liable, and properly enough; and it was because they could not justly be made any longer liable that the limitation was fixed there.

791 There is in us all a sense of justice, which is stronger than even constitutional law itself. In our enactments, and in the administration of law, Legislatures and courts often stop at barriers which the Constitution has not placed in their way, because they see that justice compels them to stop at that point.

Now, sir, the Constitution has not imposed, we have not by the Constitution imposed, any duty upon a county, city, parish, or any other subdivision of a State, to enforce the laws, to provide protection for the people, to give them equal rights, privileges, and immunities. The Constitution has declared that to be the duty of the State. The Constitution, in effect, says that no State shall deny to its citizens the equal protection of the laws, and I understand that that declaration, that prohibition, applies only to the States, so far as political or municipal action is concerned. But the State, within its boundaries, has the creation and the control of the laws for the protection of the people. What can the county do? What can the parish do? What can a city do, to give me the equal protection of the laws? The city and the county have no power except the power that is given them by the State. They cannot keep violence away from me; they cannot protect me in my rights, except as the State has clothed them with the power to do so; and for the enforcement of the laws of the State they get no aid, no authority, no power whatever from the United States.

In most of the States—it is so in mine, I know—the counties and the towns have no

791 power whatever in this regard except as those powers have been conferred upon them by the State; and these powers can be taken from them at any time by the State. If these powers are not given to them by the State, or if they hold them only at the will of the State, what justice is there in making the town, city, or parish liable for not protecting the property of citizens, when perhaps no laws for its protection exists; for not giving me protection, when they have not been clothed by the State with the right and power to give me protection?

Thus it seems to me—and, as I said before, I am only arguing this point in the light of its justice, and not as a strict question of constitutional law—that we are imposing upon a community an obligation that we have no right to impose upon them, that in justice we cannot impose upon them for the reason that such municipalities are, as such, powerless to either make or enforce the laws of the State or of the United States. We should never impose an obligation upon a community when we do not and cannot give that community the power to discharge that obligation. We should not require a county or a city to protect persons in their lives or property until we confer also upon them the power to furnish that protection.

I hold that this duty of protection, if it rests anywhere, rests on the State, and that if there is to be any liability visited upon anybody for a failure to perform that duty, such liability should be brought home to the State. Hence, in my judgment, this section would be liable

791 to very much less objection, both in regard to its justice and its constitutionality, if it provided that if in any State the offenses named in this section were committed, suit might be brought against the State, judgment obtained, and payment of the judgment might be enforced upon the treasury of the State. . .

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REP. POLAND

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793 As I understand the theory of our Constitution, the national Government deals either with States or with individual persons. So far as we are a national Government in the strict sense we deal with persons, with every man who is an inhabitant of the United States, as if there were no States, towns, or counties; as if the whole country were in one general mass, without any subdivisions of States, counties, or towns. We deal with them as citizens or inhabitants of this great Republic. With these local subdivisions we have nothing to do. We can impose no duty upon them; we can impose no liability upon them in any manner whatever.

REP. BURCHARD

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795 But there is no duty imposed by the Constitution of the United States, or usually by State laws, upon a county to protect the people of that county against the commission of the offenses herein enumerated, such as the burning of buildings or any other injury to property or injury to person. Police powers are not conferred upon counties as corporations; they are conferred upon cities that have qualified legislative power. And so far as cities are concerned, where the equal protection required to be afforded by a State is imposed upon a city by State laws, perhaps the United States courts could enforce its performance. But counties are organized, at least in most of the States, for the management of the financial affairs of the counties. The county commissioners, county court, board of supervisors, or other body acting for the county, have power to levy taxes, but they do not have any control of the police affairs of the county and the administration of justice. These powers, I grant, are conferred in part by State laws upon some elective officers, such as the sheriff of a county, or justices of the peace and constables in the subdivisions of the counties and towns, &c. But still in few, if any, States is there a statute conferring this power upon the counties. Hence it seems to me that these provisions attempt to impose obligations upon a county

for the protection of life and person which are not imposed by the laws of the State, and that it is beyond the power of the General Government to require their performance.

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SPEECH BY REP. PERRY
IN SUPPORT OF THE MODIFIED
SHERMAN AMENDMENT

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Now, by our action on this bill we have asserted as fully as we can assert the mischief intended to be remedied. We have asserted as clearly as we can assert our belief that it is the duty of Congress to redress that mischief. We have also asserted as fully as we can assert the constitutional right of Congress to legislate. Having asserted all those things by our previous action, we do not propose to go back upon it in the way of new debate. Having, then, that constitutional right and that legislative duty imposed on us, what further duty rests upon us? It is to adopt appropriate legislation to carry out that duty. Being constitutionally authorized to act, the questions upon this amendment are questions only of expediency and discretion. They do not rise to the dignity of constitutional questions.

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SPEECH BY SEN. STEWART
IN SUPPORT OF THE BILL

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Do the State constitutions furnish protection against these Ku Klux? The State governments to-day are in the hands of the Ku Klux as much as they were in the hands of the leaders of the rebellion during the war. They control the State organizations in many States.

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Revision of the United States Statutes as Drafted by the Commissioners Appointed for that Purpose, Vol. I. "Introduction"

INTRODUCTION

The *Revised Statutes of 1873*, when published in 1875 in one volume, became the first complete revision of federal legislation by enacting into positive law all congressional legislation passed from 1789 through 1873. As is noted in all standard treatises on legal bibliography, this revision caused much dissatisfaction because of many errors as well as suspicion that the revisors had frequently exceeded their authority. Although a second edition did appear in 1878[1], it was never re-enacted into positive law. This unhappy experience in statutory revision forestalled the Congress undertaking any similar projects for nearly fifty years, when it authorized the publication of the *United States Code*. This set, however, has never been re-enacted *in toto* into positive law. Rather, since its inception, congress has been revising and re-enacting it, title by title. The latest issue of the *United States Code* is the 1970 edition covering legislation enacted through 1969. According to the preface in volume 1[2], nineteen titles of its fifty titles have been re-enacted into positive law. Thus, thirty-one titles are still only *prima facie* evidence of the law and the original authority for pre-1873 legislation for these titles is still found in the *Revised Statutes of 1873*.

It is clear, then, that the *Revised Statutes* are still of vital importance in the use and understanding of federal statutory law. It is ironic, considering that nearly a hundred years have passed, that there is not available an adequate legislative history of the *Revised Statutes of 1873*.

The need for such should be apparent and it is interesting to note that in 1960 Justice Frankfurter not only had occasion for such a legislative history, but cited erroneously another document as legislative history. This appears in *Monroe v. Pape*, 365 *U.S.* 167, 212, footnote 18, where he makes reference to *1 Revision of U.S. Statutes*, Draft (1872), 974. As will be pointed out, these volumes, technically speaking, are not *the* legislative history of *Revised States of 1873*.

History of the Legislative History of the Revised Statutes of 1873

In 1866 Congress passed a law (14 Stat. 74) authorizing the revision and publication of the permanent general laws of the United States. Under the authority of this Act, three Commissioners were appointed to carry out the revision. They were Caleb Cushing, Charles P. James, and William Johnson. By the Act of Mar. 2, 1867 (14 Stat. 455, 456) the Act of 1866 was extended by three years and three new commissioners were appointed. These were Charles P. James, Benjamin Vaughn Abbott, and Victor J. Berringer. They made several reports, but it was decided that their drafts were not acceptable, since they included too many substantial changes in the statutes and it would be impossible to enact a statutory revision proposing so many changes. Consequently, Congress by the Act of Mar. 3, 1873 (17 Stat. 579) placed the work of the revision under a joint committee of the House and Senate. This committee was authorized to receive the work of the commissioners and to discharge them. Their term of service expired on May 4, 1873. The joint committee was also authorized to appoint a person to complete the task of revising the statutes of the United States and selected

Thomas Jefferson Durant for this purpose. Mr. Durant then proceeded to revise the work of the commissioners and his revision was introduced in the 43d Congress, 1st Session, as H. 1215. The bill passed Congress and was signed by President U.S. Grant on June 22, 1874, published in 1875, and became the *Revised Statutes of 1873*.

The *Congressional Record* for January 21, 1874, (v. 182, 43d Cong. 1st Sess., p. 819, Jan. 21, 1874) refers to a report made by Durant to the joint committee, embodying a statement of the changes he had made in the work of the commissioners. In the *Checklist of United States Public Documents, 1789-1909*[3], p. 1524-25 (where the details of the efforts to publish the *Revised Statutes* are set forth) it is noted that "This report is supposed to have been published, though diligent search has failed to locate a copy."

It is apparent, then, that a complete legislative history of the *Revised Statutes of 1873* would require not only the draft of the Commissioners reprinted herein, but the missing report of Thomas Jefferson Durant. Until that volume is located, however, researchers will have to rely on and use the *Revision of the United States Statutes as drafted by the Commissioners*.

J. Myron Jacobstein
Roy M. Mersky

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[1] Revised Statutes of the United States. 2nd ed. Washington, D.C., U.S. Govt. Print. Off., 1878.

[2] United States Code, 1970 ed. v. 1, p. ix.

[3] Checklist of United States Public Documents, 1789-1909 . . . 3d ed. Rev. & Enlarged. Volume 1, Lists of Congressional and Departmental Publications. Compiled under the direction of the Superintendent of Documents. Washington, U.S. Govt. Print. Off., 1921.